

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
BENNY FITZWATER,	:	CIVIL ACTION
CLARENCE BRIGHT, TERRY PRATER,	:	NO. 2:16-cv-09849
EMMET CASEY, JR.,	:	
CONNIE Z. GILBERT,	:	Consolidated with:
ALLAN H. JACK, SR., and,	:	CIVIL ACTION
ROBERT H. LONG.,	:	NO. 1:17-cv-03861
Plaintiffs,	:	
	:	
-vs-	:	
	:	
CONSOL ENERGY, INC.,	:	
CONSOLIDATION COAL CO.,	:	
FOLA COAL CO., LLC,	:	
CONSOL OF KENTUCKY, INC.,	:	
CONSOL PENNSYLVANIA COAL CO.,	:	
LLC, and KURT SALVATORI,	:	
	:	BENCH TRIAL
Defendants.	:	VOLUME II
	x	

**TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.,
SENIOR UNITED STATES DISTRICT JUDGE
FEBRUARY 10, 2021**

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GILBERT - CROSS

(The following Bench Trial was held before the Honorable John T. Copenhaver, Jr., Senior United States District Judge, in the case of *Fitzwater, et. al. versus CONSOL, et. al*, on Wednesday, February 10, 2021, at Charleston, West Virginia.)

P-R-O-C-E-E-D-I-N-G-S

9:51 a.m.

THE CLERK: All rise.

THE COURT: Good morning. Please be seated.

Counsel ready to proceed?

MR. POMPONIO: Yes, Your Honor.

MR. TORRES: Yes, Your Honor.

CONNIE GILBERT, PLAINTIFF, PREVIOUSLY SWORN**CROSS-EXAMINATION****BY MR. TORRES:****Q.** Good morning, Ms. Gilbert.**A.** Good morning.**Q.** I just wanted to ask you a couple of questions. You described your work history at the beginning of your testimony. Do you recall that?**A.** Yes.**Q.** And I just want to make sure I got this correct. Your first -- the first time you worked for CONSOL was from '94 to '97; is that right?**A.** That's right.**Q.** Okay. And then you started at Buchanan in June of

GILBERT - CROSS

1 2005, correct?

2 **A.** Correct.

3 **Q.** Okay. So at that point, you had worked for CONSOL
4 earlier for a three-year period, correct?

5 **A.** Yes.

6 **Q.** Okay. Thank you. And you testified that at the
7 orientation that Mr. Mason conducted, he provided you some
8 materials about CONSOL benefit plans, correct?

9 **A.** Yes.

10 **Q.** Ms. Gilbert, I'm handing you what's been marked as
11 Defendant's Exhibit 8, and I wanted to ask you if that
12 document looks familiar?

13 **A.** Well, ours was a three-ring binder, and this leaflet
14 with, you know, we put in our dividers. And I don't
15 remember it being quite this thick.

16 **Q.** Okay.

17 **A.** Anyway --

18 **Q.** That's fine. So your lawyers produced this to us, Ms.
19 Gilbert, and they indicated it came from you.

20 **A.** Okay.

21 **Q.** And I just wanted to -- if you look, do you see, there
22 is some numbers, if you look at the first page up on the
23 right-hand corner, MSJ003329; can you see that?

24 **A.** Yes, at the bottom.

25 **Q.** I'm sorry?

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1 **A.** It's down here at the bottom.

2 **Q.** Right. So I'm going to use those numbers so we can
3 move around the document a little easier, okay?

4 **A.** Yes.

5 **Q.** So if you go to page MSJ003346; when you open the
6 document, then you are at the bottom of the page. Are you
7 there?

8 **A.** Yes.

9 **Q.** And there is a Post-it up in the right-hand corner with
10 some handwriting?

11 **A.** Yes.

12 **Q.** Is that your handwriting, Ms. Gilbert?

13 **A.** Yes.

14 **Q.** It is?

15 **A.** It looks like it, yes.

16 **Q.** Okay. And if you go to MSJ003357, Ms. Gilbert, this
17 has the document page says, "Plan Document for and Summary
18 Plan Description of the Consolidation Coal Company
19 Comprehensive Medical Expense Benefits Plan for Production
20 and Maintenance Employees of Buchanan Mine," correct?

21 **A.** Yes.

22 **Q.** And at the bottom it says, there is some words, but
23 included is a date of January 1, 2005, correct?

24 **A.** Yes.

25 **Q.** And that was -- 2005 is the year that you went through

GILBERT - CROSS

1 your orientation with Mr. Mason?

2 **A.** Yes.

3 **Q.** So do you remember this document, Ms. Gilbert, as
4 something you were provided during your orientation with Mr.
5 Mason in 2005 that you provided to your lawyers?

6 **A.** I remember the three-ring binder. I got that under Mr.
7 Mason.

8 **Q.** Okay.

9 **A.** And it was -- like I said, he gave us leaflets to fill
10 the three-ring binder in the orientation. Now, it's
11 possible that I got this later, you know, maybe in the year
12 or something, but I originally started out with a three-ring
13 binder.

14 **Q.** Well, if you look at -- well, Ms. Gilbert, then we just
15 established that your handwriting is in this document,
16 right?

17 **A.** Yes. Yes, but I don't know when that I got this
18 particular one. What I'm saying is -- you asked me when
19 I -- Mr. Mason gave me this. Mr. Mason did not give me
20 this. He gave me the three-ring binder with the leaflets.

21 **Q.** Ms. Gilbert, this is a copy of a document --

22 **A.** Yes.

23 **Q.** -- that your lawyers provided to us. And I'm just
24 asking you whether you deny that this is your document or
25 not?

GILBERT - CROSS

1 **A.** It looks like my document, but not the one that Terry
2 Mason gave me is what I'm trying to tell you.

3 **Q.** Well, first, let's start off with just --

4 MR. TORRES: Defendants would offer Defendant's
5 Exhibit 8, Your Honor.

6 MR. POMPONIO: No objection.

7 THE COURT: It's admitted.

8 **Defendant's Exhibit 8 admitted.**

9 BY MR. TORRES:

10 **Q.** So let's go back to this question about the three-ring
11 binder, Ms. Gilbert.

12 **A.** Okay.

13 **Q.** You go to page MSJ003336. Now, that page, if you are
14 looking at it -- Ms. Gilbert, are you looking at this page?

15 **A.** Yes.

16 **Q.** It has three holes in the page that was copied,
17 correct?

18 **A.** Yes.

19 **Q.** And so that page is smaller than the 8 1/2 x 11 page.
20 Did I get that correct?

21 **A.** Yes.

22 **Q.** So in those smaller pages, even though this is copied,
23 it doesn't look like the size of the binder Mr. Mason gave
24 to you?

25 **A.** Well, it's possible.

GILBERT - CROSS

1 Q. Well, the document is dated 2005, Ms. Gilbert, correct?

2 A. Yes.

3 Q. So do you have any real reason to doubt that this isn't
4 the document Mr. Mason gave you in 2005 during your
5 orientation?

6 A. Well, this was January, and I got hired in June. I
7 don't know.

8 Q. Okay. And if you turn to MSJ003333.

9 A. Okay.

10 Q. It's got some highlighting, correct?

11 A. Yes.

12 Q. That's your highlighting?

13 A. Yes, it is.

14 Q. And there's highlighting on that page and there is a
15 star. Is that your star that you made?

16 A. Yes, because I was looking at the information in it.

17 Q. Okay. So let's look at this information from 2005 that
18 you produced to your lawyers and they produced to us. So I
19 want to start with when you went to your orientation with
20 Mr. Mason. Do you know if you were eligible for retiree
21 medical benefits at that point in time?

22 A. No.

23 Q. You were -- you were not?

24 A. No.

25 Q. Why not?

GILBERT - CROSS

1 **A.** I didn't have enough time in. Prior to coming to Buck,
2 I worked at a union mine for CONSOL. And that was a big
3 difference. I didn't have enough time in the union.

4 **Q.** Well, I want to ask -- and you started in Buchanan in
5 June of 2005, correct?

6 **A.** Yes.

7 **Q.** So let me just ask you, then, Ms. Gilbert, when you
8 started in 2005, do you remember reading any information
9 telling you that you were not eligible for retiree medical
10 benefits because you had been hired after 2004?

11 **A.** No.

12 **Q.** Okay. So let's turn, Ms. Gilbert, and start at the
13 beginning here. If you start at page 3333, Ms. Gilbert?

14 **A.** Mm-hmm.

15 **Q.** There is at the top of that page is a bullet point, it
16 says, "Medical Plan," correct?

17 **A.** Yes.

18 **Q.** And you highlighted part of that sentence, correct?

19 **A.** Yes.

20 **Q.** And what it says is the medical plan does not provide
21 retiree medical coverage to employees who are hired or
22 rehired after August 1, 2004. Correct?

23 **A.** Yes.

24 **Q.** And were you hired after August 1 -- you were rehired
25 after August 1, 2004, correct?

GILBERT - CROSS

1 **A.** Well, I don't --

2 **Q.** Yes or no, Ms. Gilbert?

3 **A.** Yes.

4 **Q.** Okay. So according to this document that you had and
5 you gave to your lawyers, it told you that you weren't
6 eligible for retiree medical benefits, at least as of 2005,
7 because you had been rehired after August 1, 2004, correct?

8 **A.** Yes, it's what it says.

9 **Q.** Well, you highlighted it, correct?

10 **A.** Yes.

11 **Q.** So it's not that you missed that one; you highlighted
12 that one, right?

13 **A.** Yes.

14 **Q.** So when Mr. Mason allegedly promised you lifetime
15 retiree medical benefits, in fact, you weren't even eligible
16 for retiree medical benefits in 2005, correct?

17 **A.** Apparently, according to this. But being that it
18 was --

19 **Q.** There is no question pending, ma'am.

20 MR. POMPONIO: Your Honor, may the witness
21 complete her answer?

22 THE COURT: Go ahead and say what you were about
23 to say.

24 THE WITNESS: Well, my understanding was the
25 difference was where they bought Alum Creek out, which was

GILBERT - CROSS

1 part of the mine I worked for CONSOL for in -- in '94 to
2 '97. I stayed on at the union panel, so when they called me
3 to Buck, it was to clear up the union panel so they would no
4 longer be, you know, obligated to Alum Creek where they
5 bought Alum Creek out. So I thought I was being like a new
6 hire is my understanding. That's all I wanted to say.

7 BY MR. TORRES:

8 Q. Okay. Well, this says that you are not eligible for
9 retiree medical benefits if you're hired or rehired after
10 August 1, 2004, correct?

11 A. Yes.

12 Q. All right.

13 A. And --

14 Q. If we go back to 3357, Ms. Gilbert. That was the
15 portion of this document that talks about medical benefits,
16 correct?

17 A. What page again?

18 Q. 3357?

19 A. 57, okay. Yes.

20 Q. And we previously discussed that it's dated January 1,
21 2005, so that would have been four months before -- five
22 months before you started, correct?

23 A. Yes.

24 Q. Okay. So, and then if you turn to page 3361, it has --
25 that's the beginning of the Table of Contents, correct?

GILBERT - CROSS

1 **A.** 3361? Wait a minute. Okay.

2 **Q.** Take your time.

3 **A.** I have it.

4 **Q.** Okay. And so that's the Table of Contents and it runs
5 up to page 3365. Correct?

6 **A.** Mm-hmm, yes.

7 **Q.** And then after the Table of Contents at 3367, there is
8 a heading that says, "Summary Plan Description," correct?

9 **A.** Yes.

10 **Q.** Okay. So we were talking about this language at the
11 beginning of the document that said you weren't eligible for
12 retiree medical benefits if you were hired or rehired after
13 the 2004 date that we talked about a moment ago, correct?

14 **A.** Yes.

15 **Q.** Okay. Now, in the medical portion of this booklet--
16 let me stop for a second. One of the things that you said
17 Mr. Mason did during the orientation is review the materials
18 that were in the binder he gave you, correct?

19 **A.** Yes.

20 **Q.** So that would have included, among other things, your
21 medical benefits?

22 **A.** Correct.

23 **Q.** Okay. So if you turn to page 3383 of the medical plan,
24 there is a section that says, "Article II. Eligibility."

25 **A.** Article II? Okay. I got it.

GILBERT - CROSS

1 Q. And if you look at the third paragraph of the
2 eligibility section there, the first sentence says, "If your
3 most recent date of Company employment was prior to August
4 1, 2004, you and your eligible dependents may be eligible
5 for medical benefits when you retire," but you were hired
6 after August 1, 2004, correct?

7 A. Yes.

8 Q. Okay. So the next sentence, "If your most recent date
9 of Company employment is on or after August 1, 2004,
10 regardless of years of Company service, you are not eligible
11 for medical benefits as a retiree under this Plan."
12 Correct?

13 A. That's what it says.

14 Q. Okay. And then again, if you look at page 3387 -- are
15 you there, ma'am?

16 A. Yes.

17 Q. And, again, that's your highlighting there?

18 A. Yes.

19 Q. And that section that you highlighted says, "Limitation
20 on Eligibility for Retiree Medical Benefits." Do you see
21 that?

22 A. Yes.

23 Q. And that provision says, "Notwithstanding any other
24 provision in this Plan, Retiree medical benefits will not be
25 provided under this Plan to any employee who is first

GILBERT - CROSS

1 employed or who is reemployed on or after August 1, 2004."

2 Correct?

3 **A.** Yes.

4 **Q.** And you highlighted "August 1, 2004," correct?

5 **A.** Yes.

6 **Q.** Okay. And that was before -- that date was before you
7 were hired in 2005, correct?

8 **A.** Yes.

9 **Q.** Okay. And, again, if you turn to page 3394, there is
10 another section that you highlighted in the middle of this
11 page that says, "Retired or Totally Disabled Participants."

12 Do you see that?

13 **A.** Yes.

14 **Q.** And the first two words in that paragraph are
15 "Qualified retirees," correct?

16 **A.** Yes.

17 **Q.** And then there is a footnote that it refers you to at
18 the bottom of the page, correct? So after "Qualified
19 retiree" there is a Number 2?

20 **A.** Yes.

21 **Q.** And then if you look at the bottom of the page, there
22 is a Number 2?

23 **A.** Yes.

24 **Q.** And that says, "To determine your qualification for
25 benefits, refer to the heading 'Effect of Retirement Upon

GILBERT - CROSS

1 Medical Benefits in Article II,'" and that was a section you
2 were just looking at a moment ago on page 21, correct?

3 **A.** Yes.

4 **Q.** Okay. Now, in addition to these various provisions
5 that explain that you were not eligible for retiree medical
6 benefits when you started at Buchanan in 2005, I want to ask
7 you about a couple of other provisions. Turn to page
8 MSJ003371.

9 **A.** 3371.

10 **Q.** Are you there, ma'am?

11 **A.** Yes.

12 **Q.** Now, at the bottom of this page there is a number
13 paragraph 21. Do you see that?

14 **A.** Yes.

15 **Q.** And it says, "Termination, Suspension, Modification or
16 Amendment of the Plan," correct?

17 **A.** Mm-hmm.

18 **Q.** You have to say yes.

19 **A.** Yes.

20 **Q.** I do that all the time, too. And this says in this
21 document that you received and provided to your lawyer, "As
22 Plan Sponsor Consolidation Coal Company reserves the right,
23 by means of resolutions adopted by its Board of Directors,
24 to terminate, suspend, modify or amend the Plan at any
25 time," correct?

GILBERT - CROSS

1 **A.** Yes.

2 **Q.** It goes on to say, "covering any and all active
3 employees, current or future retirees or other eligible
4 covered persons, in whole or in part of the company."
5 Correct?

6 **A.** Yes.

7 **Q.** And, in fact, -- I'm sorry, if you go forward to 3375,
8 ma'am. So we are still in the section of the book dealing
9 with medical benefits, correct?

10 **A.** Yes.

11 **Q.** On 3375, at the bottom of that page, there is another
12 heading, "Termination, Suspension, Modification or Amendment
13 of This Plan." Do you see that?

14 **A.** Yes.

15 **Q.** And again, it says, "As Plan Sponsor, Consolidation
16 Coal Company reserves the right, by means of resolutions
17 adopted by its Board of Directors, to terminate, suspend,
18 modify or amend this Plan at any time, covering any or all
19 active employees, current or future retirees or other
20 eligible covered persons, in whole or in part, of the
21 Company," correct?

22 **A.** Yes.

23 **Q.** So, basically, the same language you read a couple
24 pages earlier, correct?

25 **A.** Mm-hmm.

GILBERT - CROSS

1 Q. Yes. You have to say yes.

2 A. Yes.

3 Q. And now, if you turn back to page 3340 -- well, in
4 fairness, ma'am, let's start at page 3336, okay?

5 Are you there?

6 A. Yes.

7 Q. And this was one -- this was the page we were looking
8 at before where I was showing you the three holes and this
9 was a smaller page from your copy. But this portion of the
10 booklet deals with life insurance, correct?

11 A. Yes.

12 Q. And so your recollection is that these three-ring
13 binders had different sections; one for life, one was for
14 medical, one was for other benefits that the company
15 provided, correct?

16 A. Yes, mm-hmm.

17 Q. So in the life insurance portion of this booklet --
18 now, I want you to turn to page 3340. Are you there, ma'am?
19 And there is a section there that you highlighted also,
20 correct?

21 A. Yes.

22 Q. And at paragraph 17.

23 A. Mm-hmm. Yes.

24 Q. And it says, "As Plan Sponsor, Consolidation Coal
25 Company reserves the right, by means of resolutions adopted

GILBERT - CROSS

1 by its Board of Directors, to terminate, suspend, withdraw
2 or modify the Plan at any time, covering any active employee
3 or current or future retiree or other eligible covered
4 persons, in whole or in part," correct?

5 **A.** Yes.

6 **Q.** And you also, in addition to highlighting this, you
7 underlined some words, correct?

8 **A.** Yes.

9 **Q.** You underlined, "active," "current," and "future
10 retiree," correct?

11 **A.** Yes.

12 **Q.** And you agree that that language in the life insurance
13 section that you highlighted is the same language that we
14 read in the section of the book dealing with medical
15 benefits, correct?

16 **A.** Yes.

17 **Q.** Okay. And isn't it true, Ms. Gilbert, that, in fact,
18 it wasn't until 2007 that you were told that CONSOL was
19 going to allow you to become eligible for retiree medical
20 benefits, correct?

21 **A.** In -- I don't remember that. I don't recall that.

22 **Q.** Okay. Fair enough. Now -- excuse me. One minute.
23 Now, you were at Buchanan for how many years, Ms. Johnson
24 [sic]?

25 **A.** Ms. Gilbert.

GILBERT - CROSS

1 Q. I'm sorry, Ms. Gilbert. I apologize.

2 A. I was there from 2005, and I retired in 2014.

3 Q. Okay. So in addition to the materials we looked at a
4 moment ago that Mr. Mason provided you during your
5 orientation, you received other documents from CONSOL during
6 your employment that talked about benefits, correct?

7 A. Yes.

8 Q. Okay.

9 MR. TORRES: May I approach, Your Honor?

10 THE COURT: You may.

11 BY MR. TORRES:

12 Q. Ms. Gilbert, I'm going to give you another document.
13 You can put that one to the side for now. This one is
14 marked as Defendant's Exhibit 9, okay?

15 A. Yes.

16 Q. And the first page of this document is entitled "CONSOL
17 Energy Buchanan Mine Employee Handbook," correct?

18 A. Yes.

19 Q. And that's your name up in the top left-hand corner,
20 correct?

21 A. Yes.

22 Q. And if you turn to the second page, there is a notice
23 to all Buchanan Mine employees, correct?

24 A. Yes.

25 Q. And it has a date of July 26, 2010, correct?

GILBERT - CROSS

1 **A.** Yes.

2 **Q.** And this is your document, Ms. Gilbert?

3 **A.** Yes.

4 **Q.** And you received it from the company in or around July
5 of 2010, correct?

6 **A.** Yes.

7 **Q.** And provided it to your lawyers in this litigation,
8 correct?

9 **A.** Yes.

10 **Q.** Okay.

11 MR. TORRES: Your Honor, defendants move admission
12 of Exhibit 9.

13 MR. POMPONIO: No objection.

14 THE COURT: Admitted.

15 **Defendant's Exhibit 9 admitted.**

16 BY MR. TORRES:

17 **Q.** Now, I just have a few questions about this document.
18 It's not as big as the last one we looked at, thankfully.

19 But if you go to -- first off, you read through this
20 document, right, Ms. Gilbert?

21 **A.** Probably at some point.

22 **Q.** Okay. In fact, there is highlighting in this document.
23 If you look at page 3301, that's your highlighting, correct?

24 **A.** Yes, 33?

25 **Q.** 3301?

GILBERT - CROSS

1 **A.** I'm sure it is, yeah.

2 **Q.** Okay. And on the page just to the other side or in
3 3301 and 3300 -- I'm sorry, let's back up again.

4 And if you go to the Table of Contents, so that's
5 pages -- starts at page 3296 and goes through 3298. Right?
6 The Table of Contents?

7 **A.** Yes.

8 **Q.** And it has a bunch of different topics that it covers,
9 correct?

10 **A.** Yes.

11 **Q.** And including, if you look at page 3297, there is a
12 section on employee benefits, correct?

13 **A.** Yes.

14 **Q.** Okay. Now, if you go back to page 3300, there is a
15 section at the top of that page that says, "About Your
16 Handbook," correct?

17 **A.** Yes.

18 **Q.** And the second paragraph says that, "The contents of
19 this handbook are presented as a matter of information only
20 and do not include the full text of the policies, procedures
21 and benefit plans," correct?

22 **A.** Yes.

23 **Q.** And then skipping a sentence, the third sentence is,
24 "While Consolidation Coal Company believes wholeheartedly in
25 the plans, policies, and procedures described herein, they

GILBERT - CROSS

1 are not conditions of employment," correct?

2 **A.** Yes.

3 **Q.** And then the next sentence says, "Consolidation Coal
4 reserves the right to modify, revoke, or change any or all
5 such plans, policies, or procedures at any time," correct?

6 **A.** Yes.

7 **Q.** Okay. And you recall seeing that when you read through
8 this document when you received it in 2010, correct?

9 **A.** Yes.

10 **Q.** And then yesterday your lawyer asked you whether you
11 remember receiving a retiree SPD, and he showed you a
12 document and said, have you seen something similar to that,
13 and you said you had, correct?

14 **A.** Yeah, yes. I said either I did or it was my husband's.
15 I remember now, yes.

16 **Q.** Yes. You said this wasn't the exact one but I remember
17 seeing the--

18 **A.** He showed me the one, yes.

19 **Q.** -- retiree SPD, and you said you couldn't remember
20 exactly when you saw it, but that you remember receiving it,
21 correct?

22 **A.** Yes.

23 **Q.** Now, I wasn't there, but before in this lawsuit, a
24 couple years ago, you attended a deposition, correct?

25 **A.** Yes.

GILBERT - CROSS

1 Q. And you, before that, had turned over some documents to
2 your lawyer, correct?

3 A. Yes.

4 Q. And do you recall at your deposition -- tell me if you
5 recall -- you testified that before you retired, you were in
6 Nancy Johnson's office and you saw a retiree Summary Plan
7 Description and you asked Ms. Johnson for it, and she gave
8 it to you? Do you recall that?

9 A. Yes, it was a partial one.

10 Q. Correct. But the document she gave you, you gave to
11 your lawyer, correct?

12 A. Yes.

13 Q. Okay. Hold on one second, please.

14 MR. TORRES: May I approach, Your Honor?

15 THE COURT: You may.

16 BY MR. TORRES:

17 Q. Okay, Ms. Gilbert, I'm going to show you what's been
18 marked as Deposition Exhibit 10.

19 MS. BATES: Not depo exhibit.

20 MR. TORRES: I'm sorry. Exhibit 10. Forget the
21 deposition part of that.

22 BY MR. TORRES:

23 Q. Does this document look familiar to you, Ms. Gilbert?

24 A. Yes.

25 Q. Is this the document you received from Ms. Johnson?

GILBERT - CROSS

1 **A.** Yes.

2 **Q.** And you received it before you retired?

3 **A.** Correct. Yes.

4 **Q.** And you remember -- I realize it's been some time ago,
5 but do you remember how -- how long before your retirement
6 you received it?

7 **A.** No. No, I can't.

8 **Q.** Do you remember at your deposition saying you thought
9 it was around the time your husband retired in 2009 that you
10 received this from Ms. Johnson? Does that ring a bell?

11 **A.** It's possible, yes.

12 **Q.** So possibly you received this around 2009, because
13 that's when your husband was getting ready to retire,
14 correct?

15 **A.** Yes.

16 **Q.** At least, that's what your recollection was at your
17 deposition, recognizing it's been some time?

18 **A.** Yes, it wasn't the same day that he had retired, you
19 know. It was just --

20 **Q.** I apologize. I didn't mean to suggest it was the same
21 day. It was around the time he was thinking of retiring?

22 **A.** Yes.

23 **Q.** You saw it in Ms. Johnson's office and you asked her
24 for it?

25 **A.** Yes.

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1 Q. And Ms. Johnson didn't try and -- didn't refuse to give
2 it to you; she gave it to you willing, right?

3 A. Yes.

4 Q. Okay. And --

5 MR. TORRES: Your Honor, move for admission of
6 Defendant's Exhibit 10.

7 MR. POMPONIO: No objection.

8 THE COURT: Admitted.

9 **Defendant's Exhibit 10 admitted.**

10 BY MR. TORRES:

11 Q. And this document doesn't have -- your lawyers didn't
12 put those same numbers at the bottom of the pages like the
13 other one we looked at.

14 A. Right.

15 Q. So we have to work with the actual numbered pages at
16 the bottom to keep things clear. So if you start at the
17 beginning of the document, the first page says, "Medical and
18 Prescription Drug Benefits," correct?

19 A. Yes.

20 Q. Okay. And if you go into the next two pages, there is
21 a Table of Contents, correct?

22 A. Correct.

23 Q. And then the next page after that just has a little --
24 some writing towards the bottom with some highlighting,
25 correct?

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1 **A.** Yes.

2 **Q.** And that's your highlighting, correct?

3 **A.** Yes.

4 **Q.** And if you go on to the next page then, it says, "Plan
5 Overview," right?

6 **A.** Yes.

7 **Q.** At the top, and then after that, it says, "The CONSOL
8 Energy Retiree Medical and Prescription Drug Expense
9 Benefits Plan," correct? That's what it says?

10 **A.** Yes.

11 **Q.** And then at the bottom of this, where it says, Page 1,
12 underneath it says, "Retiree Medical and Prescription Drug
13 Plan SPD, P&M Buchanan," correct?

14 **A.** Yes.

15 **Q.** And, I'm sorry, I didn't mean to go backward.
16 The prior page just has the writing towards the bottom?

17 **A.** Yes.

18 **Q.** There is a reference there as to SPD, correct?

19 **A.** Yes.

20 **Q.** And it says that that stands for "Summary Plan
21 Description," correct?

22 **A.** Summary Plan Description? I don't see that.

23 **Q.** So go to the second sentence says, the middle of the
24 sentence -- or second sentence -- second line says, "make up
25 the summary plan description," and there is a parenthetical

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1 that says, "(the SPD)," correct?

2 **A.** Yes.

3 **Q.** Okay. So this document that Ms. Johnson gave you was
4 the retiree SPD for Buchanan P&M employees, correct?

5 **A.** Yes.

6 **Q.** Okay. And you received it at some point before you
7 retired from CONSOL, correct?

8 **A.** Yes.

9 **Q.** And I want to ask you to turn to Page 57, Ms. Gilbert.
10 Are you there?

11 **A.** Just about.

12 **Q.** Okay. I don't mean to rush you. I apologize. Are you
13 there?

14 **A.** Yes.

15 **Q.** Oh, I'm sorry. So the top of this page says, "Payment
16 of Benefits to Others," correct?

17 **A.** Yes.

18 **Q.** And then below that it says, "Future of the Plan,"
19 correct?

20 **A.** Yes.

21 **Q.** And then under that it says, "The Board of Directors of
22 CONSOL can amend, modify, suspend, or terminate all or part
23 of the Plan at any time," correct?

24 **A.** Board of Directors?

25 **Q.** I'm sorry?

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1 **A.** Now what paragraph are you reading there?

2 **Q.** Under the "Future of the Plan"?

3 **A.** Okay, I got it.

4 **Q.** Okay. "The Board of Directors of CONSOL can amend,
5 modify, suspend, or terminate all or part of this Plan at
6 any time," correct?

7 **A.** That's what it says.

8 **Q.** Okay. And if you go to the very last page of this
9 document, all the way to the back, according to the bottom
10 of this, the bottom of this page says, "page 12, Retiree
11 Life," correct?

12 **A.** Yes.

13 **Q.** So this section of the booklet that Ms. Gilbert -- I'm
14 sorry -- Ms. Johnson gave you dealt with life insurance,
15 correct?

16 **A.** I'm sorry. Life?

17 **Q.** Correct.

18 **A.** Let me read it here. I'm refreshing my memory.

19 **Q.** Oh, I'm sorry. Take your time.

20 **A.** To the best of my memory.

21 **Q.** To the best of your memory, it does?

22 **A.** Well, let me see.

23 **Q.** Let me do it this way, Ms. Gilbert. Make it easier.
24 This is page 12 at the bottom?

25 **A.** It says that, yes.

GILBERT - CROSS

1 **Q.** Go back to page 1. So follow those numbers at the
2 bottom back to page 1. Just keep going backwards in the
3 document from where you are at, and let me know when you are
4 at page 1.

5 **A.** In the beginning?

6 **Q.** No. No. Start at the back and just go from page 12 to
7 page 1.

8 **A.** Okay. Okay.

9 **Q.** So this page has a Post-it on to the right, correct?

10 **A.** Yes.

11 **Q.** And at the top it says, "Plan Overview," correct?

12 **A.** Yes.

13 **Q.** And then below that it says, "The CONSOL Energy Inc.
14 Retiree Life Insurance Plan ("Life Insurance Plan or Plan")
15 offers a flat dollar benefit amount to your beneficiary in
16 the event of your death," correct?

17 **A.** Yes.

18 **Q.** And you highlighted that sentence, correct?

19 **A.** Yes.

20 **Q.** So would you agree with me that the page we were
21 looking at a moment ago, page 12, is part of this booklet
22 that deals with retiree life insurance, correct?

23 **A.** Yes.

24 **Q.** So let's go back to page 12. And that page in the
25 middle section says, "Future of the Plan," correct?

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1 **A.** Yes.

2 **Q.** And you highlighted that "Future of the Plan," correct?

3 **A.** Yes.

4 **Q.** And you highlighted the entire paragraph below it,
5 correct?

6 **A.** Yes.

7 **Q.** And it says, "The Board of Directors of the Company can
8 amend, modify, suspend, or terminate all or part of the Plan
9 at any time," correct?

10 **A.** Yes.

11 **Q.** And that's the same language that we were looking at in
12 the medical benefits section of this booklet earlier,
13 correct?

14 **A.** Yes.

15 **Q.** Now, you said you retired in 2014, correct?

16 **A.** Correct.

17 **Q.** And before you retired, you received on an annual basis
18 a Benefits Enrollment Guide from CONSOL, correct?

19 **A.** Well, we sign up on our insurance every year, and, you
20 know, like that.

21 **Q.** Do you remember receiving any written documents from
22 CONSOL having to do with annual enrollment?

23 **A.** They gave us pamphlets to pick out our insurance every
24 year.

25 **Q.** Okay. Do you remember if any of those documents says

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1 that CONSOL could terminate those benefit plans at any time?

2 **A.** I don't recall.

3 **Q.** Okay.

4 MR. TORRES: May I approach, Your Honor?

5 THE COURT: You may.

6 BY MR. TORRES:

7 **Q.** Ms. Gilbert, I'm going to show you what's been marked
8 as Defendant's Exhibit 11. Before I ask you -- all right.

9 Have you seen that document before, Ms. Gilbert?

10 **A.** Yes.

11 **Q.** Okay. It has your handwriting on the front page,
12 correct? It says, "Keep 2011 yr," correct?

13 **A.** Yes.

14 **Q.** First page says, "CONSOL Energy," and at the bottom it
15 says, "Your 2011 Benefits Enrollment Guide," correct?

16 **A.** Yes.

17 **Q.** And I am correct, Ms. Gilbert, that since this talks
18 about your benefits for 2011, you would have received this
19 some time in 2010, right, because you had to make your
20 decision for what your benefits were going to be the next
21 year, usually in the fall? Does that sound right?

22 **A.** Yes.

23 **Q.** So you think you received this sometime in the fall of
24 2010; does that sound right?

25 **A.** That sounds right.

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1 Q. Okay.

2 MR. TORRES: Your Honor, we offer Defendant's
3 Exhibit 11.

4 MR. POMPONIO: No objection.

5 THE COURT: Admitted.

6 **Defendant's Exhibit 11 admitted.**

7 BY MR. TORRES:

8 Q. And this document would have explained to you how your
9 benefits will look for the coming year, right, so for 2011,
10 correct?

11 A. Our insurance, yes.

12 Q. And at that point you were still on the active
13 insurance, because you hadn't retired yet, correct?

14 A. That's correct.

15 Q. And if you turn to the second page of this document,
16 the bottom it says, MSJ003597; do you see that?

17 A. Yes.

18 Q. And that's the Table of Contents, so it tells you
19 what's in the document, correct?

20 A. Yes.

21 Q. And then there is some language to the left of that; do
22 you see that?

23 A. Yes.

24 Q. And the second-to-last sentence there, right next to
25 the Table of Contents says, "CONSOL can amend or terminate

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1 any of its benefit programs at any time and for any reason,"
2 correct?

3 **A.** That's what it says.

4 **Q.** And you read through this booklet, correct?

5 **A.** Well, when we went to sign up for insurance, they have
6 it in the class setting. And it was like Mr. Casey said
7 yesterday, you had first shift, second shift, and third
8 shift. And Nancy and them come in and would go through this
9 with what the insurance would be, and we had what plans we
10 need to pick out and that kind of thing.

11 **Q.** My question was just, you read through this booklet
12 when you received it?

13 **A.** I didn't really pay attention to that, because when
14 they were saying --

15 **Q.** Well, Ms. Gilbert, if you turn to page 3603 --

16 **A.** 3603.

17 **Q.** -- you highlighted it there, correct?

18 **A.** Yes.

19 **Q.** And if you go to page 3605. At the top there, you made
20 some notations about PPO's, correct?

21 **A.** Yes.

22 **Q.** And the next page, 3606, you made some notations about
23 2010, correct?

24 **A.** Yes.

25 **Q.** 3607, if you can go there, ma'am. You highlighted the

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1 "Caremark 202" area and you circled a couple areas and made
2 some other notes?

3 **A.** Yes.

4 **Q.** And made some additional notations on 3608, correct?

5 **A.** 08? Yes.

6 **Q.** And then 3612 -- no, that's not you.

7 So, Ms. Gilbert, you read through this material,
8 correct?

9 **A.** Well, I read through this, because this was the part
10 that we had to go and pick out our policies. And I circled
11 these so I would know which ones that I was going to take.

12 **Q.** And do you remember that you continued to receive these
13 types of materials up until the time that you retired,
14 correct?

15 **A.** Yes.

16 **Q.** Okay.

17 MR. TORRES: May I approach, Your Honor?

18 BY MR. TORRES:

19 **Q.** Ms. Gilbert, I'm going to show you what's been marked
20 Defendant's Exhibit 12, and ask you if you're familiar with
21 that document?

22 **A.** Yes.

23 **Q.** That's your handwriting on the top first page?

24 **A.** Yes.

25 **Q.** Is that correct?

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1 **A.** Yes.

2 **Q.** Okay. And this one says, "Your 2012 Benefits
3 Enrollment Guide," correct?

4 **A.** Yes.

5 **Q.** At the top?

6 **A.** Yes.

7 **Q.** And, again, since this talks about benefits for 2012,
8 you would have received it sometime in 2011, correct?

9 **A.** Yes.

10 MR. TORRES: We would offer Defendant's Exhibit
11 12, Your Honor.

12 MR. POMPONIO: No objections.

13 THE COURT: Admitted.

14 **Defendant's Exhibit 12 admitted.**

15 BY MR. TORRES:

16 **Q.** And, again, if you turn to the second page of this
17 document, Ms. Gilbert, there is a Table of Contents again,
18 correct?

19 **A.** Correct.

20 **Q.** And, again, if you look to the left of that, there is
21 some language, correct?

22 **A.** Yes.

23 **Q.** And the second to the last sentence says, "CONSOL can
24 amend or terminate any of its benefit programs at any time
25 for any reason," correct?

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1 **A.** Yes.

2 MR. TORRES: May I approach, Your Honor?

3 THE COURT: You may.

4 BY MR. TORRES:

5 **Q.** Ms. Gilbert, I'm going to show you what's been marked
6 Defendant's Exhibit 13. Are you familiar with this
7 document?

8 **A.** 2013.

9 **Q.** Why don't you turn to page 3646.

10 **A.** Yeah.

11 **Q.** That's your handwriting on the top, correct?

12 **A.** Yes.

13 **Q.** And this -- the first page of this one says, "CONSOL
14 Energy" at the top, correct?

15 **A.** Yes.

16 **Q.** And it says, "Your 2014 Benefits Enrollment Guide,"
17 correct?

18 **A.** Yes.

19 **Q.** And again, because this is for 2014, you would have
20 received this in 2013, which was the year before you
21 retired, correct?

22 **A.** Yes.

23 MR. TORRES: Defendants move admission of
24 Defendant's 13, Your Honor.

25 MR. POMPONIO: No objection.

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1 THE COURT: Admitted.

2 **Defendant's Exhibit 13 admitted.**

3 BY MR. TORRES:

4 **Q.** And again, turn to the second page, Ms. Gilbert, where
5 the Table of Contents is. Are you there?

6 **A.** Yes.

7 **Q.** There is some language to the left, it says, "Here's
8 What's Inside," and under that there is some language,
9 correct?

10 **A.** Yes.

11 **Q.** And again, I'm sorry, it's a little bit fainter because
12 of the green color, but the second-to-last sentence on that,
13 in that area again says, "CONSOL can amend or terminate any
14 of its benefit programs at any time and for any reason,"
15 correct?

16 **A.** That's what it says.

17 **Q.** And again, when you received this document and getting
18 ready to enroll for your benefits, you reviewed it, correct?

19 **A.** I didn't -- I reviewed this (indicating).

20 **Q.** You didn't read that. No one told you to ignore it,
21 correct?

22 **A.** No.

23 **Q.** And you made notes throughout this as you were looking
24 at your benefits, correct?

25 **A.** Yeah.

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1 Q. Did I get that right?

2 A. Yes.

3 Q. Okay, thank you. So, Ms. Gilbert, so now we've looked
4 at the handbook Mr. Mason gave you in 2005, correct?

5 A. Yes.

6 Q. We've looked at the handbook you got from Buchanan in
7 2010, correct?

8 A. Yes.

9 Q. We have looked at the retiree SPD that you got sometime
10 around 2009 -- and, again, I'm not trying to hold you to a
11 specific -- when your husband was thinking of retiring,
12 correct?

13 A. Yes.

14 Q. And we've looked at some Enrollment Guides you received
15 in 2010, 2011, and 2013, correct?

16 A. Yes.

17 Q. And all of those documents, one way or the other,
18 stated that CONSOL reserved the right to terminate benefits
19 at any time and for any reason, correct?

20 A. That's what they say.

21 Q. Okay. And so when Mr. Mason was describing your
22 benefits during that initial orientation, your lawyer asked
23 you if he discussed the reservation of rights, and I think
24 your answer was you don't recall?

25 A. I can't recall he ever did, no.

GILBERT - CROSS

1 Q. Okay. So it's possible he pointed it out; you just
2 don't recall sitting here today?

3 A. I don't recall.

4 Q. Okay. Fair enough. And then in these comparisons --
5 or the comparisons that you said Mr. Mason made about the
6 UMWA benefits, do you remember what years that occurred in?

7 A. It would have been 2005, when he was teaching the
8 class.

9 Q. After 2005, you testified yesterday there were other
10 times when they made comparisons between UMWA and CONSOL
11 benefits?

12 A. Yes.

13 Q. So that would have been during the same time you were
14 receiving documents from CONSOL telling you that they
15 reserved the right to terminate the benefits at any time,
16 correct?

17 A. That's what we did, yes.

18 Q. That's correct?

19 A. Yes.

20 Q. Okay. And I had a question about the discussions
21 you -- or your testimony yesterday about Mr. Mason. You
22 were -- you said that when Mr. Mason was comparing the
23 CONSOL benefits to the UMWA, that he knew what you knew
24 about the UMWA benefits or something to that effect?

25 Do you recall that testimony?

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1 **A.** Yes.

2 **Q.** I wasn't sure what you actually meant by that.

3 Did you ask Mr. Mason what he knew, or was this just
4 your assumption? I just want to make sure I'm clear.

5 **A.** I didn't specifically ask him, but he had worked
6 through the -- in and around the union people, and he knew
7 that CONSOL had bought out Alum Creek and all the union
8 people had to come to Buck.

9 **Q.** Okay. So that's what you were referring to?

10 **A.** Yes, because he was the one that cleared up the union
11 panel that I was on.

12 **Q.** Okay. So he knew that you were formerly a union
13 employee; that's what you meant?

14 **A.** Yes. Yes.

15 **Q.** Okay. But he never told you that CONSOL benefits were
16 going to be guaranteed like the UMWA's benefits, correct?

17 **A.** Yes.

18 **Q.** He did?

19 **A.** Yes.

20 **Q.** Okay. Even though he was also giving you a document
21 that said CONSOL could terminate these benefits at any time?

22 **A.** Well, all I know is what he said.

23 **Q.** Okay.

24 **A.** He said that -- he said that their benefits was good as
25 the union's, if not better.

GILBERT - CROSS

1 Q. Okay. Well, if that's all Mr. Mason said; he didn't
2 actually say they were guaranteed, correct? He just said
3 they were the same, if not better? That's your testimony?

4 A. Well, that's -- I'm telling you that the
5 interpretation, being that he meant that -- the
6 interpretation he gave us.

7 Q. Got it. So let me just get this straight.

8 What Mr. Mason actually said, as you recall, is that
9 the benefits were the same, if not better, correct?

10 A. The same, if not better.

11 Q. Right. And you interpreted what Mr. Mason said to
12 believe that he was saying that they were somehow
13 guaranteed? Correct? That's really what happened, isn't
14 it?

15 A. He didn't specify that they weren't going to be
16 guaranteed like the union.

17 Q. He didn't say, "guaranteed," correct?

18 A. He didn't specify.

19 Q. He didn't say the word "guarantee," Ms. Gilbert; isn't
20 that correct?

21 A. I can't recall that exactly. He said they were going
22 to be as good as -- as the union's, if not better. That's
23 what I'm --

24 Q. And you interpreted that to mean that the benefits were
25 guaranteed?

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1 **A.** Yes.

2 **Q.** Okay. Thank you for clearing that up. And also, so
3 I'm clear, was Mr. Mason the person who conducted all of
4 those presentations you testified to yesterday we were
5 talking about the comparison between benefits, the UMWA
6 benefits and CONSOL benefits?

7 **A.** No. This was only in the orientation that Mr. Mason --

8 **Q.** Okay. And so that's what I just want to make clear.
9 So after -- so Mr. Mason just did the initial orientation;
10 is that correct?

11 **A.** For me, yes.

12 **Q.** Okay. And so these other -- these other meetings that
13 you testified to where they were making comparisons after
14 that, were those the ones that Mr. Kowzan presented? I'm
15 just trying to understand who was doing the other
16 presentations.

17 **A.** Okay. I had -- after Terry, I had Nancy Johnson; I had
18 Gerald Kowzan with Nancy a lot of times; I had Mike Adams.

19 **Q.** Okay. And those are the people you mentioned yesterday
20 and that's what I was just trying to clear up. Those are
21 the people who would have done the subsequent presentations
22 after your initial orientation?

23 **A.** Yes.

24 **Q.** Got it. And am I correct that, like Mr. Mason, none of
25 those said that CONSOL benefits were guaranteed; they were

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1 saying again the CONSOL benefits were just as good, if not
2 better, than the UMWA benefits? Did I get that right?

3 **A.** Yes.

4 **Q.** And then you interpreted that to mean they were
5 guaranteed, correct?

6 **A.** Yes.

7 **Q.** Okay. And when your lawyer was asking you about these
8 presentations about the comparisons between UMWA and CONSOL,
9 he asked you whether in the course of that presentation
10 anyone mentioned a reservation of rights clause, correct?
11 And you said, "No"?

12 **A.** Well, I can't remember. I mean, nobody told us, you
13 know.

14 **Q.** Okay. Again, I'm not quibbling with you. Yesterday,
15 he asked you during these presentations, did anybody mention
16 a reservation of rights clause, and you said, "No"?

17 **A.** No.

18 **Q.** You were receiving documents during this period of time
19 that included reservation of rights language that we just
20 established, right?

21 **A.** Apparently, I was, yes.

22 **Q.** And, again, he asked you about the retirement seminar
23 that you attended with your husband?

24 **A.** Yes.

25 **Q.** And he asked you again, did anyone during that

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1 retirement seminar -- when did you attend that seminar with
2 your husband?

3 **A.** 2006.

4 **Q.** Thank you. And again, he asked you, did anyone say
5 anything about the reservation of rights clause, and you
6 said, "No." Correct?

7 **A.** That's correct.

8 **Q.** But I think you'll agree with me that during this
9 period, you were -- before and after that seminar, you were
10 receiving documents from CONSOL saying they could terminate
11 the benefits at any time for any reason, correct?

12 **A.** Yes.

13 **Q.** And then if I understand correctly, you said that you
14 retired in September of 2014, correct?

15 **A.** Yes.

16 **Q.** And at that point, CONSOL had already announced that it
17 was going to eliminate the benefits after five years,
18 correct?

19 **A.** After five years. That's what I was told.

20 **Q.** Right. And then within a fairly short period of time,
21 they sent another letter saying, it's not going to be five
22 years; it's going to be the end of 2015, correct?

23 **A.** Yes. In June.

24 **Q.** June of 2015?

25 **A.** Mm-hmm.

GILBERT - CROSS

1 Q. So nine months after you retired, they told you, we are
2 not doing this for five years; it's just all gone, right?

3 A. Yes.

4 Q. And so by the time you actually retired that, that was
5 all -- CONSOL had already made that announcement. That's
6 why you were retiring. Nancy Johnson called and said, this
7 is happening, and so if you want to get benefits for five
8 years, you should retire, correct?

9 A. Yes.

10 Q. And so then I think your counsel asked you if you had
11 received any documents from CONSOL after you retired, so I
12 guess in September 2014, and you said, "No." Correct?

13 A. Yes, I didn't -- I don't remember that Summary Plan
14 Description he tried to show me yesterday.

15 Q. But the Summary Plan Description that I showed you
16 today was the one for Buchanan P&M, and you received that
17 before CONSOL announced it was terminating these benefits,
18 correct?

19 A. At one point, when we talked about it. I couldn't
20 remember when, though.

21 Q. Right. Well, it was sometime before you retired?

22 A. Yes.

23 Q. And you thought it was sometime around when your
24 husband was thinking of retiring?

25 A. Yes.

GILBERT - CROSS

1 Q. And, again, that was before you decided to retire,
2 correct?

3 A. Yes.

4 Q. Okay. Where did your husband work?

5 A. He worked at Alum Creek and then he -- then when CONSOL
6 bought them out, they kept everybody on, and he went from
7 the -- from there to Buck.

8 Q. Got it. And then your lawyer was asking you some
9 questions about how much it's cost you to have coverage
10 after CONSOL terminated benefits. Do you remember that?

11 A. Yes.

12 Q. So just so we are clear, at the time that you retired
13 in September of 2014, how much a month were you paying for
14 your medical insurance?

15 A. I'd have to look back through this to find out.

16 Q. It's not a memory test, Ms. Gilbert. If you don't
17 recall, that's fine. I just didn't know if you remembered.
18 Was it a monthly premium you were paying?

19 A. It was all during my working time, and so it was every
20 two weeks, I was paying.

21 Q. Okay. Do you know when you retired -- so after you
22 said, I'm leaving, in September of 2014, did you continue to
23 have to pay for your medical insurance?

24 A. No, I don't believe I did. I can't remember that I
25 did. And I paid for -- only thing I paid for was -- after

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1 2015, I had to pay for the COBRA.

2 **Q.** We'll get to the COBRA in a second. I wanted to
3 understand, between September of 2014 and when you retired
4 in June 2015, when they terminated benefits, whether you
5 were continuing to pay something on a monthly basis for
6 medical insurance?

7 **A.** I don't recall paying, but I had insurance.

8 **Q.** Okay. Was your husband paying for his medical
9 insurance?

10 **A.** No, he was on mine.

11 **Q.** He was on yours. And you just don't recall if you were
12 paying or not?

13 **A.** No.

14 **Q.** And then on the COBRA, you said you paid \$1,300, and I
15 wasn't clear, was that per month or in total?

16 **A.** That was for the three-month period.

17 **Q.** So that covered the three months after CONSOL
18 terminated benefits?

19 **A.** Yeah. And that was just for me.

20 **Q.** Just for you, okay. And then -- so you don't think you
21 were paying for your medical insurance, and then you paid
22 for COBRA for three months. And then you were talking about
23 your Medicare supplement that you purchased afterwards,
24 correct?

25 **A.** Yes.

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1 Q. And it's your testimony that you would not have paid
2 that if you were still on CONSOL's medical benefits?

3 A. Not for my supplement, not for the supplement, because
4 when I retired, I -- I got my medical insurance for up until
5 they took it away.

6 Q. Okay. I just want to be clear. Your testimony is that
7 the -- whatever you were paying for the Medicare supplement,
8 you believe would have been covered if CONSOL hadn't
9 terminated its benefits?

10 A. Yes. For the supplement part.

11 Q. For the supplement part, got you. And other than the
12 supplement -- how much was the supplement costing you?

13 A. Last year, it was around \$2,000 for mine, and it was
14 about \$2,400 for my husband.

15 Q. And that's \$2,000 a year, or a month?

16 A. No, it was for the year.

17 Q. Okay. Do you know if that's the same amount you were
18 paying in prior years, or you just don't recall?

19 A. I don't believe it was the same amount. It seems like
20 it went up -- I really don't recall without looking at my
21 paperwork.

22 Q. Okay.

23 MR. TORRES: Can I have just a minute, Your Honor?

24 THE COURT: Yes.

25 (Pause.)

GILBERT - CROSS

1 BY MR. TORRES:

2 Q. Sorry about the Medicare supplement questions. The
3 \$2,000 that you are paying for the Medicare supplement,
4 that's coming out of your social security; is that correct?

5 A. Yes.

6 Q. Okay. And the \$2,400 is coming out of your husband's
7 social security?

8 A. Yes.

9 Q. Other than that supplement, are there other moneys that
10 you believe you're paying because CONSOL terminated the
11 benefits?

12 A. Well, we have our out-of-pocket, every time we go, for
13 co-pays and all that type of thing, that Medicare would not
14 cover, the supplement would not cover. We have to come up
15 with it.

16 Q. But under the CONSOL retiree medical plan, there were
17 co-pays and things like that, correct?

18 A. Yes.

19 Q. Okay. So you don't know the difference between what
20 your co-pay is now versus what it would have been under the
21 retiree benefit plan?

22 A. No.

23 Q. No?

24 A. No.

25 Q. Okay. So going back to Mr. Mason and these other

GILBERT - CROSS

1 people that you identified today, you would agree with me,
2 Ms. Gilbert, that no one from CONSOL ever told you that Mr.
3 Mason had any authority to change the terms of CONSOL's
4 written benefits plan, correct?

5 **A.** Not to my knowledge.

6 **Q.** Okay. And the same is true for Mr. Kowzan, right, no
7 one ever told you he had any authority to change the terms
8 of the written benefits plan?

9 **A.** No one ever said any of them had any authority or --
10 well, they didn't tell us -- I don't know what kind of
11 classes they went through. All I know is what me and you
12 talked, what you are telling me, you know.

13 **Q.** But I'm just asking you so we are clear. No one ever
14 told you that Mr. Mason had authority to change the written
15 benefits plan, correct?

16 **A.** No. And nobody questioned it.

17 **Q.** And no one ever told you Mr. Kowzan had any such
18 authority, correct?

19 **A.** No. They just said they were the representatives we go
20 to.

21 **Q.** No one ever told you that Ms. Johnson had authority to
22 alter the written benefits plan?

23 **A.** It would be the same thing; it was the one we went to.

24 **Q.** And no one said that about Mr. Adams, correct?

25 **A.** Mr. Who?

GILBERT - CROSS

1 Q. Mr. Adams?

2 A. No. The same thing.

3 Q. And you don't have any knowledge that anyone at CONSOL
4 ever told any of these individuals you named to lie about
5 CONSOL's benefit plans, correct?

6 A. Not to my knowledge.

7 Q. And you don't know if anyone from CONSOL told these
8 individuals to make any misrepresentations to you regarding
9 your benefit plans, correct?

10 A. I had no idea of what classes they went to. They had
11 their own classes for their training.

12 Q. My question is: But you don't know -- you have no
13 knowledge that CONSOL ever told them to go out and lie about
14 these benefits?

15 A. No, I have no knowledge.

16 Q. And/or that CONSOL told them to make misrepresentations
17 about these benefits; you don't have any knowledge that
18 CONSOL ever did that, correct?

19 A. No.

20 Q. And you don't know if CONSOL told any of these
21 individuals to promise you lifetime benefits, correct?

22 A. I have no -- no.

23 Q. You don't know if CONSOL told these individuals to make
24 any misrepresentations to you, correct?

25 A. No.

GILBERT - REDIRECT

1 Q. And you don't know if CONSOL ever told these
2 individuals that they had any authority to change any of the
3 written terms of CONSOL's written benefit plan, correct?

4 A. That's correct.

5 Q. Okay. All right.

6 MR. TORRES: Thank you, Ms. Gilbert.

7 Your Honor, I have no further questions.

8 **REDIRECT EXAMINATION**

9 **BY MR. POMPONIO:**

10 Q. Ms. Gilbert, could you turn to Defendant's Exhibit
11 Number 8, please.

12 A. 8? Okay.

13 Q. Do you recall during your testimony -- if you turn to
14 page 3333, MSJ003333?

15 A. 3333, what? All right.

16 Q. You were asked some questions about that highlighted
17 section, correct?

18 A. Yes.

19 Q. If you turn to page 3340, you highlighted that section
20 as well, correct?

21 A. Yes.

22 Q. Do you recall when you made -- when you highlighted
23 these parts of this? Was it contemporaneously when you
24 received it or was it at a later date?

25 A. Best I can remember was after we found out that they

EXAMINATION BY THE COURT

1 was going to take our insurance and that kind of thing, I
2 was just going through then seeing where -- if my husband or
3 I, either one, qualified for insurance, which it was the
4 things like that, I was going through and trying to
5 understand it.

6 Q. Okay. Thank you. Nothing further.

7 MR. TORRES: No further questions, Your Honor.

EXAMINATION

8
9 **BY THE COURT:**

10 Q. Let me ask you to expand on what you just stated with
11 respect to the highlighting that was specifically asked
12 regarding pages 33, I'll call them, for you.

13 When is it that those were highlighted? Do you know?

14 A. It was after I retired.

15 Q. Thank you.

16 THE COURT: Anything further?

17 MR. TORRES: No. We are fine, Your Honor. Thank
18 you.

19 THE COURT: Anything further, Mr. Pomponio?

20 MR. POMPONIO: Nothing, Your Honor.

21 THE COURT: And may Ms. Gilbert be excused?

22 MR. POMPONIO: Yes, Your Honor.

23 THE COURT: Mr. Torres, may Ms. Gilbert be
24 excused?

25 MR. TORRES: Yes, Your Honor.

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1 THE COURT: Let met ask you to not discuss your
2 testimony with any other witness in this case, except the
3 other parties, until we finish this trial, Ms. Gilbert.

4 And I thank you very much for being with us. You're
5 excused.

6 THE WITNESS: Thank you.

7 THE COURT: The next witness.

8 MR. PETSONK: Your Honor, the plaintiffs would
9 call Bob Long.

10 If possible, Your Honor, I think the parties would
11 benefit for a minute to swap out documents.

12 THE COURT: Go ahead.

13 MR. PETSONK: Your Honor, may I step to the side
14 as the defendants are doing this?

15 THE COURT: You may.

16 THE CLERK: Mr. Long, if you'd please take the
17 lectern. Please raise your right hand to be sworn.

18 **ROBERT HEISLEY LONG, PLAINTIFF, SWORN**

19 THE CLERK: Will you please state your full name
20 for the record and spell it.

21 THE WITNESS: Robert, R-O-B-E-R-T, Heisley,
22 H-E-I-S-L-E-Y, Long, L-O-N-G.

23 THE CLERK: Thank you. And if you would please
24 take the stand.

25

LONG - DIRECT

DIRECT EXAMINATION**BY MR. PETSONK:****Q.** Are you situated, Mr. Long?**A.** Yes, sir.**Q.** Thank you. Where do you reside?**A.** I live in McMurray, Pennsylvania.**Q.** Are you married?**A.** Yes.**Q.** What is your birth date?**A.** June 10th, 1948.**Q.** And so what's your current age?**A.** 72.**Q.** And are you currently retired?**A.** Yes.**Q.** When were you last employed?**A.** 2008.**Q.** And who was your employer at that time?**A.** Alpha Natural Resources.**Q.** And where were you employed before Alpha?**A.** 84 Mining Company, which was run by CONSOL Energy.**Q.** And how long did you work for CONSOL Energy?**A.** 35 years total.**Q.** And where -- and where was the location that you last worked for CONSOL?**A.** Last worked for CONSOL at Mine 84.

LONG - DIRECT

1 Q. And where is that geographically?

2 A. It's in Washington County, Pennsylvania.

3 Q. And how long did you work there?

4 A. Three years.

5 Q. And where did you work next before that?

6 A. I worked at Enlow Fork Mining Company.

7 Q. And who was your employer there?

8 A. CONSOL Energy.

9 Q. And how long did you work -- where was that location?

10 A. That was in Greene County and Washington County,
11 splitting counties, in southwestern, Pennsylvania.

12 Q. And how long did you work at that location?

13 A. Approximately, nine years.

14 Q. And were you paid -- during the entire time that you
15 worked for CONSOL, were you paid on a salaried or an hourly
16 basis, or was it both?

17 A. I was in the union for two years, which would have been
18 an hourly base. The other 33 years with CONSOL was salary.

19 Q. During your employment with CONSOL, were there
20 occasions when the company discussed with you or explained
21 to you about your entitlement to retiree welfare benefits?

22 A. Yes.

23 Q. And can you list those occasions for me first, and then
24 I'll ask you some questions about them in turn. What was
25 the first occasion when CONSOL discussed with you or

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1 explained to you about your entitlement to retirement
2 welfare benefits?

3 **A.** Yes, sir. In 1969, I was employed by Pittsburgh Coal
4 Company, which was a division of Consolidation Coal Company.
5 My first introduction to the healthcare benefits that they
6 provided was with the Human Resources person, and that was
7 located in Albury, Pennsylvania.

8 **Q.** And I'll come back to that. What was the next occasion
9 when CONSOL discussed with or explained to you about your
10 entitlement to retirement welfare benefits as you remember?

11 **A.** That was when I was called to go to Enlow Fork Mining
12 Company.

13 **Q.** And I'll ask you about that. What was the next
14 occasion after that initial -- well, let me ask you, what
15 was the setting in which you were presented or explained
16 about your retiree welfare benefits when you came to work at
17 Enlow Fork Coal Mine?

18 **A.** Enlow Fork, traditionally, when they were hiring or
19 ramping up hires for the new operation, any employee had to
20 be -- whether they be applying for a P&M job or management
21 job, had to start as a P&M. So my initial benefits review
22 was in 1991, with all the other newly hired employees.

23 **Q.** Okay. I'll ask you more about that in a moment.

24 **A.** However --

25 **Q.** What is the next occasion where you recall that CONSOL

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1 discussed with or explained to you about your entitlement to
2 retirement welfare benefits after that initial point that
3 you referenced in 1991?

4 **A.** There were several occasions -- you have to remember
5 that, that Enlow, in most mining operations that they
6 conducted, they had weekly meetings, which they would have
7 the safety personnel, they would have HR, the mine
8 superintendent would always speak every Wednesday, and they
9 would just discuss, you know, conditions at the mine, any
10 pertinent changes that were upcoming, production. And they
11 were there to answer any questions that anybody may have.

12 **Q.** Okay. And were there any other occasions after that
13 where you recall discussing retirement welfare benefits with
14 a -- with CONSOL -- or let me rephrase.

15 Were there any occasions after that where you recall
16 CONSOL discussed with you or explained to you your
17 entitlement to retirement welfare benefits after that,
18 setting aside those periodic meetings?

19 **A.** Well, I was fortunate that Enlow Fork as most of the
20 mines that I worked in, I had a good working relationship
21 with most managers there.

22 **Q.** Did you recall that there were any other occasions when
23 CONSOL discussed with or explained to you your retirement
24 welfare benefits?

25 **A.** Well, I'm trying to get to that. What I'm saying is

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1 that I could got to Luke Gianato, the HR representative of
2 the mine, with any questions I may have, and we often
3 discussed things informally.

4 **Q.** So going with your first reference to 1969, you stated
5 that CONSOL explained to you your eligibility for your
6 entitlement to retirement welfare benefits at that time.
7 Who explained that to you at that time?

8 **A.** I'm sorry to say I don't remember.

9 **Q.** Do you remember what that person's position was with
10 the company?

11 **A.** He was the HR representative for Pittsburgh Coal.

12 **Q.** And what, if anything, did he tell you about those
13 retirement welfare benefits at that time?

14 **A.** Well, he reviewed all the healthcare benefits,
15 prescription drugs, eye, vision, dental, healthcare
16 insurance, long-term insurance, disability insurance. They
17 had gone over all of those, all of those programs and the
18 eligibility requirements were the same.

19 **Q.** And what did he say to you about those eligibility
20 requirements as to the retirement welfare benefits?

21 **A.** If you attained the age of 55 and had worked, I believe
22 it was 10 years back then, you were able to receive benefits
23 after that.

24 **Q.** Were those -- did you consider -- what factors did you
25 consider in deciding to become a foreman for CONSOL?

LONG - DIRECT

1 **A.** Well, in 19 -- in the late '60s, there was a lot of
2 turmoil in the industry. Unions, quite frequently, would go
3 on strike at a drop of a hat. Somebody dumped their bucket
4 of water out and people would leave. And you would miss
5 three days work. I got married in 1969 and I wanted a
6 steady income. I wanted the ability to have an investment
7 plan and provide for my family in the future. So that was
8 the impetus for me going on salary.

9 **Q.** Did you have to pay any premiums in order to receive
10 health insurance when you went on salary?

11 **A.** Yes, sir. I paid healthcare premiums for the entire 35
12 years.

13 **Q.** Okay. What if anything else did the individual from
14 Human Resources say to you in your initial meeting in 1969,
15 about the -- your entitlement to retirement welfare
16 benefits?

17 **A.** In 1969, industry-wide, it was known that CONSOL was
18 probably the best coal company in the industry
19 benefits-wise. They were -- that was a core value of the
20 company, and had been, for the most part of the time that I
21 worked for them. So I --

22 **Q.** I'm just asking you what if anything else that Human
23 Resources --

24 MR. TORRES: Objection, Your Honor; move to
25 strike. He lacks foundation to testify as to the industry

LONG - DIRECT

1 or the corporate knowledge of CONSOL.

2 THE COURT: As to the foundation, that portion of
3 the response is stricken.

4 You may start anew.

5 BY MR. PETSONK:

6 Q. Mr. Long, what if anything else beyond -- you testified
7 that the individual from Human Resources informed you that
8 you had to attain the age of 55 and reach 10 years of
9 service with CONSOL in order to retire with welfare
10 retirement benefits; is that accurate?

11 A. That's correct.

12 Q. Did that individual state to you that CONSOL reserved
13 the right to terminate retirement welfare benefits after you
14 retired?

15 A. No, sir.

16 Q. What else, if anything, did that individual say to you
17 about your entitlement to retirement welfare benefits? I
18 don't mean to -- I'm just asking you what you remember. And
19 it may be that you do not remember anything further.

20 A. I remember the fact that I reviewed the entire benefit
21 packet. I found it to be substantial insurance. And I was
22 reassured by the HR personnel there that it was, and I was
23 quite satisfied with that.

24 Q. What was the next occasion when you recall that CONSOL
25 discussed or explained to you your entitlement to retirement

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1 welfare benefits?

2 **A.** That would have been at Enlow Fork, the initiation
3 process that everybody had gone through.

4 THE COURT: What year are we speaking of?

5 BY MR. PETSONK:

6 **Q.** What year are you speaking of?

7 **A.** Oh, I'm sorry, sir. That would have been in 1991.

8 THE COURT: Thank you.

9 BY MR. PETSONK:

10 **Q.** You said an initiation process. Who attended that
11 initiation process at Enlow Fork that you've referenced in
12 1991?

13 **A.** Those would have been potential employees. Numbers
14 there could have been probably 15 to 20. They typically had
15 them when we were staffing the mine, probably every week, as
16 we staffed the mine.

17 **Q.** Anyone else who attended besides employees?

18 **A.** Yes. The superintendent of the mine would speak at the
19 orientation. They would have the safety director speak. HR
20 would speak to the issues of healthcare and benefits.

21 **Q.** How many days long was the orientation?

22 **A.** Orientation was three days.

23 **Q.** Have you described all the people who attended on each
24 of those three days?

25 **A.** I think, to the best of my recollection, yes.

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1 Q. Do you remember the name of the individual who
2 explained retirement welfare benefits at that orientation?

3 A. That would have been Luke Gianato.

4 Q. And what was his position with the company?

5 A. He was a local HR representative for Enlow Fork.

6 Q. And who did Luke Gianato work for, as far as you
7 understand?

8 A. There was a corporate HR person in '91. I'm sorry, I
9 can't remember the name. But it may have been the current
10 HR manager at corporate.

11 Q. That's okay. If you don't recall, that's fine.

12 What was Luke's role as HR manager at Enlow Fork?

13 A. Well, Luke's role technically would have been anything
14 concerned with HR, whether people would come to him with
15 questions of healthcare, anything involved with healthcare,
16 anything involved with, you know, insurance problems; he was
17 there to assist everyone. And employment issues, as well.

18 Q. What, if anything, did Mr. Gianato say in the
19 orientation meeting about retirement welfare benefits?

20 A. As everybody else described here, they had visuals at
21 the meetings. They had comparisons of the UMWA as opposed
22 to the P&M's at the time, and it was a distinct difference
23 they went through and outlined the differences in each of
24 those. They talked about disability insurance, dental
25 insurance, vision, life insurance. They spoke of the

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1 investment plan for the employees. So it was a whole gamut
2 that he discussed there.

3 THE COURT: Let me ask if this is a good stopping
4 point?

5 MR. PETSONK: It may be. Yes, Your Honor, that's
6 fine.

7 THE COURT: If so, we'll be in recess for 15
8 minutes.

9 And, Mr. Long, treat yourself during the recess as
10 though you are on the witness stand and do not discuss your
11 testimony with anyone. And we'll be back in 15 minutes.
12 I'm going to ask you that you follow me out of the courtroom
13 door, and go down the corridor.

14 And we'll be back in 15 minutes.

15 THE CLERK: All rise.

16 (A recess was taken at 11:19 a.m. until 11:42 a.m.)

17 THE CLERK: All rise.

18 THE COURT: Please be seated. Counsel may
19 proceed.

20 MR. PETSONK: Thank you, Your Honor.

21 BY MR. PETSONK:

22 Q. Mr. Long, you were describing an orientation session
23 that you participated in when you went to work at the Enlow
24 Fork mine in 1991. Do you recall testifying about that
25 before we broke?

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1 **A.** Yes, sir.

2 **Q.** You referenced that the HR manager named Luke Gianato
3 explained your retirement welfare benefits at that
4 orientation. What did Mr. Gianato explain that you would
5 receive as to those retirement welfare benefits?

6 **A.** We would receive hospitalization, dental, vision, eye
7 care, prescription drugs; mentioned the eligibility
8 requirements for retirement, what you can do, how early you
9 can retire.

10 **Q.** What, if anything, did Mr. Gianato say about CONSOL's
11 right to terminate your retirement welfare benefits?

12 **A.** There was never any time in my career at CONSOL where
13 anybody verbalized anything like that.

14 **Q.** Did you ask any questions at the orientation about your
15 benefits?

16 **A.** I did not ask questions at the orientation in a group
17 session, no.

18 **Q.** Did CONSOL invite you to bring anyone with you to that
19 orientation session, Mr. Long?

20 **A.** Yes, my wife attended one of the three days.

21 **Q.** And just for clarity, what is her name?

22 **A.** Frances.

23 **Q.** And which of the three days did she attend?

24 **A.** I do not -- I don't remember if it was the first or
25 third. I'm not quite sure.

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1 Q. Do you remember the content of the presentation on the
2 day that she attended?

3 A. I think, for the most part, it was review of what we
4 had gone over previously; a brief description of
5 hospitalization, what you are to receive. That was,
6 essentially, it.

7 Q. Did Mr. Gianato make any characterizations or
8 comparisons to give you an understanding of the retirement
9 welfare benefits that you would receive in that
10 presentation?

11 A. In the presentation with my wife, I really can't
12 remember if that was done or not. However, I think
13 initially that, on the first day, that comparison was made
14 throughout the entire day between the UMWA, the existing
15 UMWA benefits and the P&M benefits.

16 Q. And what did Mr. Gianato explain about the UMWA
17 benefit, retirement benefits specifically, if anything, as
18 opposed to in comparison to the CONSOL retiree welfare
19 benefits?

20 A. Well, presented it on a chart, it was categorized for
21 both UMWA and the P&Ms. Particularly of importance to that
22 group, of course, was the ability to retire at 55, with 10
23 years of service, with full benefits. That was particularly
24 important to those people at the time.

25 MR. TORRES: Objection. Objection; move to

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1 strike. Lacks foundation to testify as to what other people
2 felt was important, Your Honor.

3 THE COURT: Sustained.

4 BY MR. PETSONK:

5 Q. Mr. Long, was Mr. Gianato's representation about the
6 retirement welfare benefits important to you?

7 A. Of course.

8 Q. And why was it Mr. Gianato's explanation of your
9 entitlement to receive retiree welfare benefits in that
10 orientation session, why was that presentation important to
11 you, Mr. Long?

12 A. Well, it was most important -- not that you intended to
13 retire at 55, but that if something should have happened to
14 any one of the employees at that point in time, any family
15 event that may have happened, you had the ability to retire
16 at 55 under the guidelines of the plan. That was extremely
17 important to me.

18 MR. TORRES: Same objection, Your Honor. He keeps
19 saying "they," referring to other individuals as opposed to
20 himself.

21 THE COURT: Well, the Court will disregard the
22 answer insofar as it relates to anyone other than the
23 defendant -- other than the witness, excuse me.

24 MR. TORRES: Thank you, Your Honor.

25

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1 BY MR. PETSONK:

2 Q. Mr. Long, was it your understanding that what you just
3 described, that is, the entitlement to receive retiree
4 benefits applied to you?

5 A. Yes.

6 Q. And how long did you understand based on Mr. Gianato's
7 presentation at the orientation that you would be entitled
8 to receive retirement welfare benefits?

9 A. Throughout life.

10 Q. Going back, you stated -- and I don't know if you
11 remember, you said you struggled to remember the name of Mr.
12 Gianato's supervisor, or Mr. Gianato's superior in the Human
13 Resources Department -- did you remember that name or do you
14 know who that person was?

15 A. The name is still on the tip of my tongue, but I cannot
16 recall his name at this point in time.

17 Q. Do you recall where he worked geographically?

18 A. He worked at CONSOL headquarters.

19 Q. Where was that located?

20 A. Which is on Fort Couch Road in Upper St. Clair.

21 Q. What else do you recall, if anything, Mr. Gianato --

22 THE COURT: Just a moment. I simply wanted to
23 clear up one thing. You said St. Clair?

24 THE WITNESS: St. Clair.

25 THE COURT: Ohio?

LONG - DIRECT

1 THE WITNESS: Oh, I'm sorry. St. Clair,
2 Pennsylvania. Upper St. Clair, Pennsylvania.

3 THE COURT: Thank you.

4 BY MR. PETSONK:

5 Q. So it's your testimony, then, that Mr. Gianato worked
6 for the senior HR official, whose name you cannot recall, at
7 CONSOL headquarters in Upper St. Clair at that time in 1991;
8 is that correct?

9 A. That is correct.

10 Q. What, if anything, did Mr. Gianato say in that
11 orientation session about the -- about CONSOL's -- about the
12 likely future of benefits for that CONSOL's retiree welfare
13 benefit plan?

14 A. As I mentioned earlier, I never had a discussion openly
15 in a session there. I spoke with Luke privately and asked
16 him this question about CONSOL reserving the right to
17 cancel, amend, or suspend the healthcare plan. And his
18 words essentially were that, "Bob," he said, "if you look
19 around here, we've spent billions of dollars in this
20 operation. We have one operating right now that exceeds --
21 is close to 10 million tons a year, and we expect it the
22 same for the second. I don't think that is an issue."

23 Q. Did you receive -- you've addressed documents that you
24 received at the 1991 meeting. Did Mr. Gianato review
25 documentation with you at that 1991 orientation meeting?

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1 **A.** He reviewed all documentation at that orientation
2 meeting.

3 **Q.** And did it appear to you that Mr. Gianato had the
4 authority to convey the information that he conveyed to you
5 about the retirement welfare benefits?

6 MR. TORRES: Objection. Calls for a legal
7 conclusion.

8 THE COURT: The witness may answer.

9 BY MR. PETSONK:

10 **Q.** You can answer.

11 **A.** Yes.

12 **Q.** And how did you have that understanding, that is, he
13 had the authority to say what he said to you about the --
14 the terms of the retiree welfare benefit plan?

15 **A.** Well, he was a company representative in the HR
16 Department, and he was the one that supported Enlow Fork.
17 He was a lifeline in HR for Enlow.

18 **Q.** And which company did it appear to you you're saying he
19 represented?

20 **A.** CONSOL Energy.

21 **Q.** Mr. Long, you testified you previously were a member of
22 the UMWA earlier in your mining career. If you had remained
23 a member of the UMWA, that is, the United Mine Workers of
24 America Labor Union, what do you know about whether you
25 would still have retirement welfare benefits today?

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1 MR. TORRES: Objection. Calls for speculation.

2 THE COURT: The witness may answer. You might ask
3 him, though, the basis of his knowledge before he does.

4 BY MR. PETSONK:

5 Q. Mr. Long, what do you know about the retirement welfare
6 benefits that are available to union coal miners today?

7 A. It is my understanding, that with 10 years of service
8 with the UMWA, you are eligible for retirement benefits,
9 healthcare. If, in fact, you have 20 years of service, you
10 get the full complement of benefits for life through the
11 UMWA.

12 Q. So if you had remained a member of the UMWA, is it your
13 understanding that having attained over 35 years of service
14 with your employer, had that been an employer covered by the
15 UMWA's contracts, that you would still have retiree welfare
16 benefits today?

17 A. Without question.

18 Q. You referenced periodic meetings, weekly meetings that
19 occurred during the time you worked at Enlow. Do you recall
20 specifically what CONSOL said about your retirement welfare
21 benefits during those meetings?

22 A. Typically, at those weekly meetings on Wednesday, there
23 were a host of different topics that were talked about. If
24 there were changes in a healthcare plan, that would be
25 discussed. Changes in any type of policy at the mine, that

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1 would -- so it ran the whole gamut -- anything of interest
2 to the employees at the mine. You always had the
3 opportunity to ask questions.

4 **Q.** And when the topic of retirement benefits came up in
5 these weekly meetings, who do you recall specifically in
6 CONSOL's management made the explanation regarding the
7 retirement welfare benefits?

8 **A.** Luke Gianato.

9 **Q.** And did Mr. Gianato ever inform you during those
10 updates in the weekly meetings about your retirement welfare
11 benefits that CONSOL asserted or reserved the right to
12 terminate those retirement welfare benefits?

13 **A.** As was mentioned before, it was never in my entire
14 career mentioned to any employee.

15 **Q.** Now, Mr. Long, how old were you when you left Enlow
16 Fork Mine?

17 **A.** 52.

18 **Q.** Were you employed right away after you left Enlow?

19 **A.** Well, several months had gone by, and then I had gone
20 to 84.

21 **Q.** While you were off, what healthcare did you have, if
22 any?

23 **A.** I obtained healthcare through COBRA.

24 **Q.** How much did that cost you?

25 **A.** At that time, I believe it was \$1,200 a month.

LONG - DIRECT

1 Q. And for how many months did you pay that \$1,200 COBRA
2 premium?

3 A. I believe it may have been three months. It was
4 unsustainable.

5 Q. Where did you work next?

6 A. 84.

7 Q. And who was your employer at 84?

8 A. CONSOL Energy.

9 Q. And just to be clear, is 84 an underground coal mine
10 also?

11 A. That's correct.

12 Q. And was that also located in 84, Pennsylvania?

13 A. That's also correct.

14 Q. And what year did you go back to work at the 84 Mine
15 for CONSOL?

16 A. 2001.

17 Q. And why did you go back to work at that time for
18 CONSOL?

19 A. Well, there were several reasons, one of which was that
20 I was short of obtaining the requirements to get healthcare
21 benefits for life. I needed three years. That was -- that
22 was the biggest -- biggest determining factor. But there
23 were also other factors that we -- I don't really think we
24 need to get into at this time.

25 Q. Okay. Well, just state those other factors for clarity

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1 sake.

2 **A.** Well, after I left Enlow Fork, I stayed in touch with
3 the activities of CONSOL, especially locally. 84 had
4 experienced quite a few problems on their longwall
5 operation. I went down to engineering and spoke with them,
6 talked with head of engineering to see what was going on,
7 and they suggested that I come back to work for them.

8 **Q.** Okay.

9 **A.** That's enough.

10 **Q.** Who was the Human Resources representative for CONSOL
11 at 84 Mine?

12 **A.** That was Tex Berlin.

13 **Q.** And when you went back to work at 84 Mine, what, if
14 anything, did Tex Berlin tell you about your retiree welfare
15 benefit benefits?

16 **A.** He told me my retiree benefits would continue as they
17 were before, as they were at Enlow; the benefits were the
18 same as CONSOL Energy.

19 **Q.** When did you notify CONSOL that you wanted to retire?

20 **A.** I spoke with the superintendent on a Saturday, at the
21 end of May.

22 **Q.** Of what year?

23 **A.** 2003.

24 **Q.** And when did your retirement from CONSOL become
25 effective?

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1 **A.** I believe it was effective June 25th, somewhere in that
2 neighborhood.

3 **Q.** Did you begin receiving retiree welfare benefits at
4 that point?

5 **A.** Yes.

6 **Q.** Did Mr. Berlin tell you at that time that CONSOL
7 reserved or asserted the right to terminate your retiree
8 welfare benefits?

9 **A.** No, sir.

10 **Q.** Did you continue working after you left CONSOL?

11 **A.** Yes, sir.

12 **Q.** Where did you work next?

13 **A.** I worked for Foundation Coal, which was later purchased
14 by Alpha Natural Resources.

15 **Q.** Did Alpha Natural Resources offer you healthcare
16 benefits?

17 **A.** Yes.

18 **Q.** Did you accept those benefits?

19 **A.** No.

20 **Q.** Why not?

21 **A.** I had had healthcare benefits through CONSOL for 35
22 years. I had never had an issue with claims of any sort.
23 It was fantastic insurance; you had healthcare, eye, vision.
24 I had no reason to change.

25 **Q.** And did you keep your CONSOL benefits while you worked

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1 at Alpha Natural Resources?

2 **A.** That is correct; I kept them.

3 **Q.** And did you work for Alpha long enough to earn a
4 retirement from that company?

5 **A.** I worked five years for Alpha.

6 **Q.** Did you work there long enough to earn a retirement
7 from that company?

8 **A.** Yes.

9 **Q.** Let me see here. Mr. Long, bear with me one second.

10 MR. PETSONK: Your Honor, may I approach the
11 witness to present --

12 THE COURT: Yes.

13 MR. PETSONK: -- an exhibit?

14 BY MR. PETSONK:

15 **Q.** Mr. Long?

16 THE COURT: What's the exhibit?

17 MR. PETSONK: That would be marked Plaintiff's
18 Exhibit 8.

19 MR. TORRES: Do you have a copy?

20 MR. PETSONK: Yes.

21 BY MR. PETSONK:

22 **Q.** Mr. Long, does this document look familiar? Look
23 through it. It's several pages long.

24 **A.** Yes, it does.

25 **Q.** And what does it appear to be? What does it appear to

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1 contain, Mr. Long?

2 **A.** Pertains to the notification of termination of
3 healthcare benefits by CONSOL. And in conjunction with
4 Murray Energy.

5 **Q.** It's a series of letters; is that right?

6 **A.** That is correct.

7 **Q.** And on the first page, did you receive this letter
8 that's presented on the first page of the exhibit?

9 **A.** Yes.

10 **Q.** And who did you receive this letter from?

11 **A.** CONSOL.

12 **Q.** And at the last sentence on the page, can you read that
13 sentence?

14 **A.** "As of April 1st, 2014, your coverage under the CONSOL
15 plan is terminated and you will no longer be able to use
16 your CONSOL retiree benefit cards."

17 **Q.** And what's the date when this letter was issued that
18 you see there at the top?

19 **A.** March 14, 2014.

20 **Q.** After April 1st, 2014, do you know whether CONSOL
21 continued to provide benefits or was that, in fact, the end
22 for you?

23 **A.** During the transition period, CONSOL agreed to pay some
24 of those premiums until Murray Energy actually made that
25 final transition to their plan.

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1 Q. Okay. And when you reference Murray Energy -- look to
2 the second page. Have you had the chance to look at the
3 second page? It's stamped MSJ001002.

4 A. Oh, 1002? Oh, I'm sorry. Hold on.

5 Q. What's the date of the top of the page that you are
6 looking at there, Mr. Long?

7 A. April 8, 2014.

8 Q. And there is a sentence in bold lettering in this
9 letter; do you see that?

10 A. Yes.

11 Q. Can you read that sentence into the record?

12 A. "This communication is to inform you that your retiree
13 benefits, including any eligibility for such coverage, will
14 end on December 31st, 2014."

15 Q. Now, who was this letter from?

16 A. This was from Murray Energy.

17 Q. Okay. And look to the next page of the exhibit, if you
18 would. And this page is stamped MSJ001000?

19 A. Yes, sir.

20 Q. And what is the date of -- well, what does this appear
21 to be to you, Mr. Long?

22 A. This is a notification that -- that the healthcare
23 benefits provided by Murray Energy, Incorporated, will be
24 terminated on December 31st, 2014.

25 Q. And do you remember receiving this letter as well?

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1 **A.** Yes, sir.

2 **Q.** And did your benefits, your retiree welfare benefits,
3 in fact, come to a close and terminate on December 31st,
4 2014?

5 **A.** That is correct.

6 MR. PETSONK: Bear with me one second, Your Honor.
7 I just have a few additional questions.

8 BY MR. PETSONK:

9 **Q.** What did CONSOL provide you, as far as any benefits, at
10 the time that they terminated your health care? Did they
11 provide any sort of a terminal benefit?

12 **A.** No.

13 **Q.** Mr. Long, have you and your wife incurred medical
14 expenses out-of-pocket since you lost your retiree welfare
15 benefits from CONSOL effective that date that you referenced
16 here, April 1st, 2014?

17 **A.** Yes.

18 **Q.** And how much have you paid annually out-of-pocket for
19 medical expenses since that time?

20 **A.** I just looked at it recently, and it was \$39,000.

21 **Q.** That's cumulative over the years?

22 **A.** For the entire period, yes, sir.

23 THE COURT: And what is the entire period? Of
24 what is the entire period?

25 THE WITNESS: 2014 to 2019.

LONG - DIRECT

1 THE COURT: That is, are you speaking of December
2 31, '14?

3 THE WITNESS: I believe so, yes.

4 THE COURT: So starting with January 1, through
5 what date?

6 THE WITNESS: I don't know -- it was the end of
7 2019. Those are the records that we submitted.

8 THE COURT: And so for the four years of 2015
9 through 2019, you paid out \$39,000 in those benefits that
10 you are telling us you thought would have been covered based
11 on the 55 and 10 arrangement?

12 THE WITNESS: That is correct. As a matter of
13 fact, it's a little bit less than \$39,000 -- 39,8-something,
14 if I'm not mistaken.

15 THE COURT: 38,8 or 39,8?

16 THE WITNESS: 39,8 -- 39,8.

17 THE COURT: Thank you.

18 MR. PETSONK: I don't have any further questions
19 at this time, Your Honor.

20 MR. TORRES: You didn't offer your exhibit.

21 MR. PETSONK: Excuse me. I would move for entry
22 of Plaintiff's Exhibit Number 8, Your Honor.

23 THE COURT: Any objection?

24 MR. TORRES: No objection, Your Honor.

25 THE COURT: Admitted.

LONG - CROSS

1 **Plaintiff's Exhibit 8 admitted.**

2 BY MR. TORRES: Just one minute, Your Honor.

3 (Pause.)

4 **CROSS-EXAMINATION**

5 **BY MR. TORRES:**

6 **Q.** Mr. Long, if I understand your testimony, the person
7 who promised you lifetime benefits at CONSOL was Mr.
8 Gianato, correct?

9 **A.** That's correct.

10 **Q.** And you worked with Mr. Gianato from 1991 until 1996?

11 **A.** '99.

12 **Q.** '99, I apologize. So whatever Mr. Gianato promised you
13 occurred during that time period, correct?

14 **A.** Yes.

15 **Q.** And Mr. Berlin never made you any promises of lifetime
16 benefits, correct?

17 **A.** No. That was a pretty quick transition there. It
18 wasn't necessary.

19 **Q.** Mr. Berlin never made you any promises of lifetime
20 benefits when you worked at that mine, correct?

21 **A.** That's correct.

22 **Q.** Okay.

23 MR. TORRES: And did I give you a copy for the
24 Judge?

25 THE COURT: No.

LONG - CROSS

1 MR. TORRES: I apologize.

2 BY MR. TORRES:

3 Q. After you were advised by Murray Energy that they were
4 terminating your benefits in 2014, CONSOL announced that it
5 was also terminating benefits for employees who hadn't been
6 transferred to Murray Energy, correct?

7 A. I believe so, yes.

8 Q. Right.

9 A. Yes.

10 Q. Your co-plaintiffs all were advised in October of 2014
11 that their benefits would be terminated, correct?

12 A. Yes.

13 Q. And after that announcement, you wrote a letter to
14 CONSOL Energy, correct?

15 A. Correct.

16 Q. And --

17 MR. TORRES: May I approach, Your Honor?

18 THE COURT: You may.

19 BY MR. TORRES:

20 Q. I wanted to show you what's been marked as Defendant's
21 Exhibit 14, and ask you if you are familiar with that
22 document?

23 Well, let's do it this way, do you see the document,
24 sir?

25 A. Yes, I do.

LONG - CROSS

1 Q. It's dated February 2nd, 2015, correct?

2 A. That's correct.

3 Q. And it's to CONSOL Energy, Inc., correct?

4 A. Yes.

5 Q. And the second page -- if you turn to the second page,
6 it has a signature of Robert Long at the top of it, correct?
7 Second page, Mr. Long?

8 A. It doesn't have two pages.

9 Q. Turn it over. It's double-sided, I apologize.

10 A. I don't see my signature on it, but --

11 Q. It has your name, correct?

12 A. Yes, that's correct.

13 Q. And this is a letter you sent to CONSOL, correct?

14 A. Yes.

15 Q. Okay.

16 MR. TORRES: Your Honor, defendants offer Exhibit
17 15 --

18 THE COURT: 14.

19 MR. TORRES: 14.

20 THE COURT: Any objection?

21 MR. PETSONK: No objection.

22 THE COURT: It's admitted.

23 **Defendant's Exhibit 14 admitted.**

24 BY MR. TORRES:

25 Q. And if you turn or look at the fourth paragraph of your

LONG - CROSS

1 letter, Mr. Long, the first sentence says, "The
2 justification for this proposal is that Retiree Healthcare
3 and Life Insurance Benefits, although not promised in
4 writing or protected by law, are benefits that were earned
5 during the long working careers of CONSOL employees,"
6 correct?

7 **A.** That's correct.

8 **Q.** So you knew as of February 2015, that CONSOL had made
9 no written promises regarding retiree medical benefits,
10 correct?

11 **A.** Yes.

12 **Q.** And you knew throughout your career that CONSOL had in
13 writing reserved the right to terminate the benefits it
14 provided to its employees and retirees, correct?

15 **A.** Could you ask that again, please?

16 **Q.** Sure. You knew throughout your career that CONSOL had
17 in writing reserved the right to terminate medical benefits
18 for both its current employees and its retirees, correct?

19 **A.** That is also correct.

20 **Q.** Okay. And, in fact, after you sent your letter to
21 CONSOL, you were interviewed by a reporter for the
22 Pittsburgh Post-Gazette. Do you recall that?

23 **A.** Yes, I do. Let me add this, at our deposition, you
24 asked me that question at the deposition. I was somewhat
25 taken back by it and surprised at the time. I did not -- I

LONG - CROSS

1 did not remember that interview. However, I went home and
2 checked my records, and you are 100 percent right; I made
3 that statement.

4 **Q.** Okay. Well, that's certainly what you testified to at
5 our deposition as well, sir. So let's get the article out
6 and we can let everybody else know what we are talking
7 about.

8 **MR. TORRES:** May I approach, Your Honor?

9 **THE COURT:** You may.

10 **BY MR. TORRES:**

11 **Q.** Mr. Long, I'm showing you what's been marked as
12 Defendant's Exhibit 15. This is an article from Pittsburgh
13 Post-Gazette, correct?

14 **A.** Yes.

15 **Q.** And it was written by an Anya Litvak, correct?

16 **A.** That's correct.

17 **Q.** And the article is discussing CONSOL's decision to
18 terminate retiree medical benefits, correct?

19 **A.** Yes.

20 **Q.** And you were interviewed for this article, correct?

21 **A.** Correct.

22 **Q.** And one of the things that you discussed with this
23 reporter was the fact that the CONSOL benefit plans, the
24 written plans contained reservation of rights clauses; is
25 that correct?

LONG - CROSS

1 **A.** That is correct.

2 **Q.** And you said -- you were quoted by Ms. Litvak as
3 saying, "That's the statement that clears them," correct?

4 **A.** I would like to see it on here. I'm trying to pick
5 that out.

6 **Q.** Sure.

7 **A.** I can't believe that -- that I would have said that
8 that is the statement that clears them. I thought what I
9 had said was most people think this case is un-winnable due
10 to the wording of the contract. That's what I remember
11 saying.

12 **Q.** Well, what Ms. Litvak quoted you as saying -- let's
13 back up.

14 At the deposition, I showed you this article and you
15 agreed with me the quote for your -- the quote was accurate,
16 correct?

17 **A.** Well, I don't see it in this writing right here, what
18 Litvak quoted me. I don't see it here. I'm trying to pick
19 it out.

20 **Q.** I'm not trying to hide it from you, sir. It's on the
21 third page, and you see there is a heading says, "Taking the
22 Fight to Court." Do you see that?

23 **A.** Yes, I do. I see it right here.

24 **Q.** Okay. And so at your deposition, I showed you this
25 quotation, and you agreed with me that it was accurate,

LONG - CROSS

1 correct?

2 **A.** No, I didn't. I did not agree with you that that was
3 accurate.

4 **Q.** Okay. You testified under oath at your deposition,
5 correct?

6 **A.** That's correct.

7 MR. TORRES: May I approach, Your Honor?

8 THE COURT: You may.

9 BY MR. TORRES:

10 **Q.** Let's do this. I'm going to hand you a copy of your
11 deposition. The first page -- it's actually the second
12 page. The bottom says, "Video Deposition of Robert Long,"
13 correct?

14 **A.** Yeah.

15 **Q.** And you had an opportunity to review your deposition
16 after you took it, correct?

17 **A.** Yes.

18 **Q.** And you agreed everything in this deposition was
19 accurate, correct?

20 **A.** Yes.

21 **Q.** Okay. So let's turn to page 137 of your deposition,
22 Mr. Long. Are you there?

23 **A.** Yes, sir.

24 **Q.** And the first question at page 137, Line 2: The
25 article is by Anya Litvak. Do you see that?

LONG - CROSS

1 **A.** Yes.

2 **Q.** And then the next paragraph says -- below that, there
3 is some -- actually some additional language attributed to
4 you in quotations, it says, "'That's the statement that
5 cleared them,'" Mr. Long said." "Everybody got that when
6 they were hired."

7 That's the question I asked you, correct?

8 **A.** Yes, that's the question you asked.

9 **Q.** And then at Line 16, I said: "To your recollection, is
10 that an accurate quotation of what you told the individual
11 who interviewed you?"

12 Do you see that question?

13 **A.** Yeah.

14 **Q.** And if you look at Line 24, your response was: "I
15 believe so."

16 Correct?

17 **A.** Yes. That's what it shows.

18 **Q.** Yes. So the quotation from Ms. Litvak was, in fact,
19 correct that you testified to under oath in your deposition;
20 isn't that right, Mr. Long?

21 **A.** Yes.

22 **Q.** Thank you. So at the time that Mr. Gianato conducted
23 your orientation, Mr. Long, he handed out materials to you,
24 correct?

25 **A.** Handed out materials?

LONG - CROSS

1 Q. Yes.

2 A. That's correct, yes.

3 Q. And going back to the article by Ms. Litvak and the
4 accurate quotation of you we were looking at a moment ago,
5 you were quoted as saying, "Everybody got that when they
6 were hired," right? That is part of the quotation in the
7 article?

8 A. That's correct.

9 Q. And what you're referring to is everyone got a written
10 benefit plan when they were hired, correct?

11 A. That's correct.

12 Q. And what you told Ms. Litvak is that those documents
13 contained a reservation of rights clause, correct?

14 A. That's correct.

15 Q. And so when you were in your orientation with Mr.
16 Gianato and he handed out the materials concerning CONSOL
17 benefits plans, among other things, it included a written
18 reservation of rights clause, correct?

19 A. That's correct.

20 Q. Okay. And you said after Mr. -- Mr. Gianato made his
21 statement during the orientation that you testified to, you
22 said, "We had a private conversation with Mr. Gianato."
23 Correct?

24 A. Yes.

25 Q. And Mr. Gianato in that conversation said he didn't

LONG - CROSS

1 think it would be an issue -- your quotation, what you
2 testified to, is you said, "Among other things, I don't
3 think that is an issue," right?

4 **A.** Yes.

5 **Q.** And what he's referring to is the possibility that
6 CONSOL might terminate benefits based on that reservation of
7 rights clause, correct?

8 **A.** Yes.

9 **Q.** But Mr. Gianato didn't say it could never happen; he
10 just expressed his opinion that based upon the state of
11 things at that point in time, he didn't think it was an
12 issue, correct?

13 **A.** That's correct.

14 **Q.** Okay. And so other than Mr. Gianato telling you in
15 that initial orientation that benefits would be for life,
16 you didn't have any other conversations with Mr. Gianato
17 where he told you that your benefits were vested or that
18 they would be for life, correct?

19 **A.** Well, I mentioned just earlier the conversation I had
20 with him privately about that reservation right. And as he
21 mentioned, that you can see that we have -- "We've invested
22 billions of dollars in this operation."

23 I just mentioned that earlier, he said, "I don't think
24 that" -- "I really don't think that's an issue. We are in a
25 good position here."

LONG - CROSS

1 It was a reassuring conversation. The only -- never
2 mind.

3 **Q.** Go ahead. Go ahead with your statement, sir.

4 **A.** That's all right.

5 **Q.** That wasn't a promise; that was an opinion, correct?

6 **A.** Yeah. Yes.

7 **Q.** So, again, my question was: Other than your
8 orientation that you testified to, Mr. Gianato made you no
9 other promises of lifetime benefits, correct?

10 **A.** No, but they demonstrated that the possibility was
11 there. That's -- that's a procedure they used to hire these
12 people. That's -- that's the statement that was never
13 referred to in any of the orientations. Although it was
14 slivered into the healthcare benefits plan, very few people
15 actually saw that.

16 MR. TORRES: Move to strike as nonresponsive, Your
17 Honor, as to what other people allegedly knew or saw or did.

18 THE COURT: Sustained.

19 BY MR. TORRES:

20 **Q.** Mr. Long, answer my question, please. Other than the
21 orientation that you testified to, Mr. Gianato never made
22 you any other promises of lifetime benefits?

23 **A.** No.

24 **Q.** You agree with me; he never did, correct?

25 **A.** No.

LONG - CROSS

1 Q. Did Mr. --

2 THE COURT: Excuse me, just a minute. The answer
3 is ambiguous. Cover that territory again.

4 BY MR. TORRES:

5 Q. Is it correct, Mr. Long, that other than the
6 orientation you testified to, Mr. Gianato never made you any
7 other promises of lifetime benefits?

8 A. That is correct.

9 Q. Thank you. And you said in your testimony about that
10 orientation in response to some questions your lawyer asked
11 you, that -- I think the way you said it was -- no one ever
12 verbalized the reservation of rights clause during the
13 orientation? Did I get that right?

14 A. Yes, you did.

15 Q. But, in fact, whether or not it was verbalized, they
16 were given written documents that contained that reservation
17 of rights clause, correct?

18 A. Yes, they were.

19 Q. I believe at your deposition we had talked about the
20 fact that you remember receiving the written materials. You
21 no longer had them by the time our deposition took place,
22 correct?

23 A. What written materials are you referring to?

24 Q. That was a bad question.

25 The benefit materials that contained the reservations

LONG - CROSS

1 of rights clause that were distributed to you during the
2 orientation in 1991. By the time your deposition occurred,
3 you no longer had those materials, correct?

4 **A.** I may have had the material, but I had known quickly
5 the reservation of rights in the healthcare benefits book.
6 I already read it. I knew that.

7 **Q.** My question was: Did you still have that document
8 after you filed this lawsuit?

9 **A.** I cannot answer that. I don't know.

10 **Q.** Well, you certainly didn't turn one over to us,
11 correct?

12 **A.** No.

13 **Q.** And the document that you received during the
14 orientation that described your benefits, that was a Summary
15 Plan Description, correct?

16 **A.** Yes.

17 **Q.** And do you remember -- it was in a binder, correct? Is
18 that correct, a three-ring binder? Does that sound right?

19 **A.** Yes.

20 **Q.** And it had the ability, if there was changes, they
21 might send changes to swap in, to try and keep it current,
22 correct?

23 **A.** That's correct. Yes.

24 **Q.** And as the years progressed, when you showed back up in
25 84 Mine, did you receive a similar booklet when you started

LONG - CROSS

1 at that location?

2 **A.** I believe I received a booklet, but I think in my
3 discussions with Mr. Berlin, that, essentially, the benefits
4 were the same.

5 **Q.** I remember you said that earlier. I'm just trying to
6 talk about -- you continued to receive descriptions of the
7 benefits throughout your employment at CONSOL, correct?

8 **A.** That's correct.

9 **Q.** And those written descriptions of the benefits
10 continued to contain reservations of rights language,
11 correct?

12 **A.** In '69, as well.

13 **Q.** Oh, you had one in '69 also?

14 **A.** I remember reading it. Every one I got, I read.

15 **Q.** Okay. So starting in 1969, all the written
16 descriptions of benefits you received contained a
17 reservations of rights clause?

18 **A.** I believe so. I think that's customary at most benefit
19 plans.

20 **Q.** Customary, okay. Got it. I want to change topics for
21 a minute. You said at the orientation meeting that was --
22 please correct me if I'm wrong -- you said you knew you were
23 going to be a salaried employee, but you had to start as a
24 P&M, correct?

25 **A.** Yes.

LONG - CROSS

1 Q. Did I get that right?

2 A. Yes.

3 Q. And the materials that were presented, if you recall --
4 and I realize it's been a long time ago -- because it was a
5 P&M orientation, did they actually cover anything?

6 A. Salaries.

7 Q. About salaried employees as well?

8 A. No, nothing. No, sir.

9 Q. And one of the things that you explained that Mr.
10 Gianato put up was some comparisons about the benefits,
11 CONSOL benefits and UMWA benefits, correct?

12 A. Right.

13 Q. So those would have been the comparison of P&M benefits
14 to UMWA, correct?

15 A. Yes.

16 Q. Okay. And that comparison didn't contain any promise
17 of lifetime benefits, correct?

18 A. The comparison said that if you worked 10 years,
19 attained age 55, that you would have benefits for life.

20 Q. So you think the written terms said, "For life"?

21 A. You know, I'm really not quite sure if it says for
22 life. But I do know -- I do know for a fact -- well, strike
23 what I was going to say. Go ahead.

24 Q. So I know you said Mr. Gianato made that oral
25 statement, and I'm just trying to see whether there was

LONG - CROSS

1 anything on that comparison that said, "For life." And it
2 sounds like you don't recall if it was? Is that fair?

3 **A.** That would be fair.

4 **Q.** Okay. And in any event, the comparison of the
5 benefits, whatever it said, would have applied to P&Ms, not
6 to salaried employees, correct?

7 **A.** Correct.

8 **Q.** Okay. And you wanted to be a salaried employee because
9 you were not interested in having your working interrupted
10 by work stoppages, correct?

11 **A.** Correct.

12 **Q.** And your counsel also asked you, when Mr. Gianato
13 conducted this orientation, how long you believed the
14 benefits would last. And you said, "Throughout your life,"
15 correct?

16 **A.** Yes.

17 **Q.** But you, in fact -- you also know there was also this
18 possibility that the benefits could be terminated based on
19 the reservation of rights clause, correct?

20 **A.** Well, I guess that's true. I guess any company can
21 make that statement.

22 **Q.** I'm sorry?

23 **A.** I think that is true. Any company can make that
24 statement. That doesn't make it right.

25 **Q.** Well, we are not here about what's right, Mr. Long;

LONG - CROSS

1 we're here about what the documents provided, and the
2 documents provided, whether you agree with it or not, that
3 the benefits could be terminated, correct?

4 **A.** That's correct.

5 **Q.** Okay. Thank you. So whatever was being shown to you
6 at orientation regarding the UMWA wouldn't have really
7 affected your job at CONSOL, because you were going to be a
8 salaried employee, correct?

9 **A.** That's correct.

10 **Q.** And then you said after you retired from CONSOL -- in
11 2003; is that right?

12 **A.** Correct.

13 **Q.** You went to Alpha Resources Mining? Did I get that
14 right?

15 **A.** Yes.

16 **Q.** And there was one thing I didn't catch. It was
17 probably because I wasn't writing fast enough here, so I
18 apologize. You said you qualified for retiree medical
19 benefits after five years at Alpha Resources; is that your
20 testimony?

21 **A.** Yes.

22 **Q.** Okay. So you could have retired from them after five
23 years with retiree medical benefits?

24 **A.** I didn't receive medical benefits at Alpha.

25 **Q.** Right. I said you could have elected them; you were

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1 eligible for them?

2 **A.** I could have, yes, but I chose to stick with CONSOL's.

3 **Q.** Did Alpha's benefit plans have reservations of rights
4 clauses as well?

5 **A.** I had no need to review their hospitalization plan,
6 because I already decided to stick with CONSOL's.

7 **Q.** So you don't know one way or the other whether it had a
8 reservation of rights clause; is that your testimony?

9 **A.** I don't know one way or another, but I would say
10 definitely they do, as well as many other companies -- most
11 companies.

12 **Q.** Okay. So your belief is that it did have a reservation
13 of rights clause, like CONSOL's?

14 **A.** Correct.

15 **Q.** Okay. Thank you. Now, do you still have Plaintiff's
16 Exhibit 8 in front of you, Mr. Long?

17 **A.** Can I just jump back a minute? The question you asked
18 me is that -- I should -- do I believe that Alpha should
19 have that clause in their benefits packet.

20 THE COURT: I think the question is whether or not
21 they had it. And --

22 MR. TORRES: Right.

23 THE COURT: -- not whether they should have.

24 MR. TORRES: That's right.

25 THE COURT: But go ahead and state what you were

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1 going to say if it falls within that parameter.

2 THE WITNESS: The idea of having this reservation
3 of rights clause in these plans enables companies to
4 discontinue healthcare insurance for their employees.
5 Supposedly, it's legal. It depends on how -- how it is
6 done; how the plans are administered. That's my personal
7 opinion. I think the clause is wrong and I think it's
8 unlawful.

9 MR. TORRES: Move to strike as nonresponsive, Your
10 Honor.

11 THE COURT: Sustained.

12 BY MR. TORRES:

13 Q. Do you have Plaintiff's Exhibit 8 in front of you, Mr.
14 Long?

15 A. Yes.

16 Q. Okay. So I want to make sure I got the sequence of
17 events right. The first page says, March 14, 2014, you
18 received a -- or you received a letter from CONSOL dated
19 March 14, 2014; is that correct?

20 A. Yes.

21 Q. And it told you that CONSOL was no longer going to
22 provide you retiree medical benefits, correct?

23 A. Yep.

24 Q. And that Murray Energy was going to start providing you
25 benefits beginning April 1, 2014, correct?

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1 **A.** Yes.

2 **Q.** So the transition you spoke about earlier was going to
3 last from March 14, 2014 to March 31, 2014, correct?

4 **A.** Yes.

5 **Q.** Two weeks, correct?

6 **A.** Yes.

7 **Q.** All right. And then the benefits that you received at
8 Murray beginning April 1, 2014, were the same as the
9 benefits that you were receiving at CONSOL; that was part of
10 the deal between CONSOL and Murray when they sold this
11 business, correct?

12 **A.** Yes.

13 **Q.** Okay. And then on April -- then you got a letter dated
14 April 8th, 2014, from Murray, stating that they were going
15 to terminate your benefits effective December 31, 2014,
16 correct?

17 **A.** Yes.

18 **Q.** And you don't know if CONSOL had any involvement in
19 Murray's decision to terminate these benefits, correct?

20 **A.** I have a lot of opinions on that. It doesn't mean it's
21 pertinent for me.

22 **Q.** So you would agree, you have no knowledge that CONSOL
23 had any involvement in Murray's decision to terminate these
24 benefits?

25 **A.** Well, they stated early on that when this transition

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1 had taken place, Murray Energy stated that they do not
2 provide healthcare benefits for their retirees.
3 Consequently, CONSOL knew that, and knew that Murray would
4 not continue healthcare benefits. So they themselves
5 approved of this, this continuation of the benefits, because
6 Murray had already stated that. They had already gone
7 through the transition process. Murray said that they no
8 longer will provide benefits, that's not -- they don't do
9 that to any of their employees. That was known by CONSOL,
10 and they accepted that.

11 **Q.** I'm not asking whether CONSOL knew that they didn't
12 provide benefits. I'm asking you -- or I'm stating -- and I
13 think it's clear -- you don't have any knowledge that CONSOL
14 had any involvement in the decision to terminate your
15 benefits, whether or not they knew it was going to happen,
16 correct?

17 MR. PETSONK: I'm going to object -- Mr. Long, I'm
18 objecting.

19 COURT REPORTER: Excuse me.

20 THE COURT: Just a moment. Go ahead.

21 MR. PETSONK: I'm going to object to a lack of a
22 foundation, and mischaracterizing the document in the prior
23 testimony, Your Honor.

24 MR. TORRES: I'm asking him whether he has any
25 knowledge, Your Honor. I'm not asking him anything

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1 foundational about this document. Either he knows that
2 CONSOL was involved in this decision or he doesn't.

3 MR. PETSONK: Your Honor, I'm just objecting.
4 It's not clear which decision he's referencing. There are
5 several documents, several notices regarding terminations,
6 and he is referring to the Murray entity and CONSOL entity.

7 THE COURT: I think you're probably in agreement.
8 Just restate the question.

9 MR. TORRES: Sure.

10 BY MR. TORRES:

11 **Q.** Mr. Long, you don't have any knowledge that CONSOL was
12 involved in Murray's decision to terminate your benefits
13 effective December 31, 2014; isn't that correct?

14 **A.** I'm saying CONSOL knew of Murray's intention to do
15 this.

16 **Q.** Please answer my question, Mr. Long. You have no
17 knowledge that CONSOL had any involvement in Murray's
18 decision to terminate your benefits effective December 31,
19 2014; isn't that correct?

20 **A.** I don't believe so, no.

21 **Q.** You agree with me?

22 **A.** No.

23 **Q.** So you have knowledge? Why don't you tell us what it
24 is? Other than your belief, sir, what evidence do you have
25 that CONSOL had any involvement in Murray's decision to

LONG - CROSS

1 terminate your benefits effective December 31, 2014?

2 **A.** I have no evidence at this point in time.

3 **Q.** Thank you. When you were talking about your -- I just
4 wanted to let -- when you were talking about your
5 out-of-pocket expenses, Mr. Long; do you recall that
6 testimony?

7 **A.** Yes.

8 **Q.** The \$39,000 -- or 39,800 was the number you ended up
9 at; is that right?

10 **A.** \$38,8 -- \$39,000.

11 **Q.** 39, for ease of discussion?

12 **A.** Right.

13 **Q.** My question was: How did you compile that number? Can
14 you tell us what you actually looked at to come up with that
15 number?

16 **A.** My wife had gone through all the records that we had
17 had at home on personal expenses, medical expenses, and
18 compiled that record and turned it in to our tax attorney.

19 **Q.** Okay. Did you provide it to your lawyers?

20 **A.** Yes.

21 **Q.** Okay. So your lawyers have it as well?

22 **A.** Yes.

23 **Q.** Okay. Fair enough. And that \$39,000, when we are
24 talking about the expenses, what -- can you give me some
25 categories as to what sort of expenses you're talking about?

LONG - CROSS

1 If you recall? It's not a memory test.

2 **A.** Well, one expense, fairly major expense was cataract
3 surgery.

4 **Q.** And, to your understanding, that surgery would have
5 been covered had you continued to receive CONSOL benefits?

6 **A.** Correct.

7 **Q.** Are all of these expenses -- or any of these expenses
8 for any supplemental coverage you're getting under Medicare,
9 for example, or is this 39 all really just out-of-pocket for
10 various medical expenses that arose during this time period
11 that you've referenced?

12 **A.** I believe most of it is out-of-pocket prescription
13 drugs, et cetera.

14 **Q.** Okay. And currently you're on Medicare?

15 **A.** That's correct.

16 **Q.** You pay for a supplement?

17 **A.** Yes.

18 **Q.** Okay. Are you -- is it just a drug supplement or is it
19 a -- what kind of coverage is it?

20 **A.** It's a drug supplement.

21 **Q.** Okay. So Medicare plus Part D?

22 **A.** Yeah.

23 **Q.** Got it. What -- okay. Thank you.

24 MR. TORRES: Could I have just one minute, Your
25 Honor?

LONG - REDIRECT

1 THE COURT: You may.

2 (Pause.)

3 MR. TORRES: Thank you, Mr. Long.

4 Thank you, Your Honor. No further questions.

5 **REDIRECT EXAMINATION**

6 **BY MR. PETSONK:**

7 **Q.** Mr. Long --

8 MR. TORRES: I apologize, Your Honor, I think we
9 neglected to offer our Exhibit 15.

10 MR. PETSONK: You did -- you did not.

11 MR. TORRES: I'm sorry. We move for the admission
12 of Exhibit 15, Your Honor.

13 THE COURT: Any objection?

14 MR. POMPONIO: None.

15 MR. PETSONK: No objection, Your Honor. Sorry.

16 THE COURT: It is admitted.

17 **Defendant's Exhibit 15 admitted.**

18 **BY MR. PETSONK:**

19 **Q.** Mr. Long, as to that exhibit Mr. Torres just
20 referenced, Defendant's Exhibit 15, the Pittsburgh
21 Post-Gazette article from October 27, 2016, do you have that
22 in front of you?

23 **A.** Yes.

24 **Q.** Would you turn to the second page of that article? And
25 it's Bate-stamped at the bottom, CONSOL 022389.

LONG - REDIRECT

1 **A.** Yes.

2 **Q.** Can you read the paragraph that says, "Mr. Long wasn't
3 buying it"? Can you -- do you see that paragraph?

4 **A.** Yes.

5 **Q.** Do you see there is a sentence that says, "It was
6 CONSOL's mantra." Could you read that, please?

7 **A.** Yes.

8 MR. TORRES: Objection. It's hearsay, Your Honor.

9 THE COURT: The witness has read it. What's your
10 next question?

11 BY MR. PETSONK:

12 **Q.** Do you see the following paragraph quotation that's
13 attributed to you? Do you see that?

14 **A.** The following paragraph?

15 **Q.** It says, "We are committed"?

16 **A.** That's correct. I see that.

17 **Q.** Can you read that sentence aloud?

18 **A.** Yes. "We are committed to getting CONSOL to fix their
19 broken promise."

20 **Q.** Okay. Is that something that you said? Is that
21 quotation accurate?

22 **A.** I think that quotation is accurate.

23 **Q.** And what is the broken promise that you're referencing
24 in that quotation?

25 **A.** To provide long-term healthcare and being able to

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1 retire at 55 years of age.

2 **Q.** Okay. And what is the promise -- when did you hear, if
3 ever, did you hear that promise? You testified your
4 orientation meeting, is that the instance that you're
5 referencing there?

6 **A.** What I mentioned earlier was there was -- at the
7 orientation, there was an understanding that those
8 participants recognize that after 10 years' service, 55
9 years of age, that they were eligible for healthcare for
10 life. That was the understanding of the people.

11 **Q.** Okay. Thank you. And please turn to the next page,
12 CONSOL 022390.

13 **A.** Yes, sir.

14 **Q.** Now, at this point, I don't think I have further
15 questions about this document.

16 One other brief question. At the orientation you've
17 described in 1991, was there any difference between your
18 retiree welfare benefits as a salaried retiree, and the
19 benefits described by Luke Gianato in that presentation?

20 **A.** Yes, the salaried employees were required to pay
21 healthcare premiums.

22 **Q.** And did you have to, indeed -- did you pay healthcare
23 premiums in order to receive your retiree welfare insurance?

24 **A.** Yes. Yes.

25 MR. PETSONK: At this point, I don't think I have

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1 any further questions, Your Honor.

2 MR. TORRES: Just briefly, Your Honor.

3 **RECROSS EXAMINATION**

4 **BY MR. TORRES:**

5 **Q.** You just testified a moment ago, Mr. Long, about what
6 people understood during the orientation. Do you recall
7 that testimony?

8 **A.** Yes. Yes.

9 **Q.** You really don't know what other people understood. I
10 think what you meant to say is that is what was explained
11 during that orientation; is that correct?

12 **A.** I think that's what they understood at the orientation.
13 After attending the orientation, seeing the presentation, I
14 think most of them understood the provisions that they had
15 laid out.

16 **Q.** Okay. Fair enough.

17 MR. TORRES: Nothing further.

18 Thank you, Your Honor.

19 THE COURT: Anything further, Mr. Petsonk?

20 MR. PETSONK: No, Your Honor. That concludes our
21 presentation of this witness.

22 THE COURT: And may Mr. Long be excused?

23 MR. PETSONK: Yes, he may.

24 MR. TORRES: Yes, Your Honor. Thank you.

25 THE COURT: And, Mr. Long, you are excused. Let

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1 me note to you that you are not to discuss your testimony
2 with any other witness in this case other than one of the
3 parties until the trial is over. And, once again, if you'll
4 follow me out through the courtroom door.

5 THE WITNESS: Yes.

6 THE COURT: Let me ask whether the parties will be
7 ready to return at 2 o'clock?

8 MR. PETSONK: We certainly can, Your Honor, as the
9 plaintiffs.

10 MR. TORRES: Yes, Your Honor.

11 THE COURT: We'll be back at 2:00. Thank you.

12 THE CLERK: All rise.

13 (A recess was taken at 12:51 p.m. until 2:00 p.m.)

14 (Afternoon Session, February 10, 2021, 2:07 p.m.)

15 THE CLERK: All rise.

16 THE COURT: Good afternoon. Please be seated.
17 The next witness.

18 MR. PETSONK: Yes, Your Honor. The plaintiffs
19 would call Clarence Bright.

20 THE COURT: Is he in the courtroom?

21 MR. PETSONK: He is.

22 **CLARENCE WAYNE BRIGHT, PLAINTIFF, SWORN**

23 THE CLERK: State your full name and spell it for
24 the record.

25 THE WITNESS: Clarence, C-L-A-R-E-N-C-E, Wayne,

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1 W-A-Y-N-E, Bright, B-R-I-G-H-T.

2 THE CLERK: If you'd please take the stand.

3 **DIRECT EXAMINATION**

4 **BY MR. PETSONK:**

5 **Q.** Good afternoon, Mr. Bright.

6 **A.** Good afternoon.

7 **Q.** Where do you reside?

8 **A.** Sutton, West Virginia.

9 **Q.** And are you married?

10 **A.** Yes, sir.

11 **Q.** And what is your wife's name?

12 **A.** Christine.

13 **Q.** And what is your birth date?

14 **A.** 3-6-1955.

15 **Q.** Sir, what is your current age?

16 **A.** 65.

17 **Q.** Are you currently retired?

18 **A.** Yes.

19 **Q.** What was your occupation before you retired?

20 **A.** I was a mechanic in a strip job.

21 **Q.** Was that hourly or a salaried job?

22 **A.** Hourly.

23 **Q.** Who was your employer when you retired?

24 **A.** CONSOL Energy.

25 **Q.** Where did you work geographically at the time of your

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1 retirement?

2 **A.** Bickmore, West Virginia.

3 **Q.** And what was the name of that operation?

4 **A.** Fola Coal Company.

5 **Q.** And how long did you work at that site?

6 **A.** A little over 19 years.

7 **Q.** And who employed you when you first began working at
8 that site?

9 **A.** It was AMVEST coal, but it was under Fola Coal.

10 **Q.** And when did CONSOL become your employer?

11 **A.** I believe it was in 2007.

12 **Q.** And were you hourly the whole time that you worked at
13 the Fola site?

14 **A.** Yes, sir.

15 **Q.** Have you ever worked at a union coal mine operation?

16 **A.** Yes, sir.

17 **Q.** To be clear, were you ever a member of the union during
18 the time that you worked at the Fola site?

19 **A.** No.

20 **Q.** How long were you a member of a union?

21 **A.** Between two and a half, three years.

22 **Q.** And what years were those? Let's try it, I can ask,
23 which union were you a member of, Mr. Bright?

24 **A.** Local 6112, District 17.

25 **Q.** What was the name of the union organization?

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1 **A.** Pratt Mine.

2 **Q.** I mean, the name of the labor union?

3 **A.** The UMWA.

4 **Q.** The UMWA?

5 **A.** Yes.

6 **Q.** That's the United Mine Workers?

7 **A.** Yes, sir.

8 **Q.** What do you understand about the benefits that you
9 received from the UMWA?

10 THE COURT: Let me ask a question before you go
11 on. When were you a union member? What years?

12 THE WITNESS: Let's see, it would have been in
13 mid-to-late '70s.

14 THE COURT: Mid-to-late '70s?

15 THE WITNESS: Yes.

16 THE COURT: And for whom were you working at that
17 time?

18 THE WITNESS: Pratt Mining.

19 THE COURT: How do you spell it?

20 THE WITNESS: P-R-A-T-T, Pratt.

21 THE COURT: And where was that located?

22 THE WITNESS: Kingston, West Virginia.

23 THE COURT: Thank you.

24 MR. PETSONK: Thank you.

25

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1 BY MR. PETSONK:

2 Q. During your employment for CONSOL, were there occasions
3 when the company discussed with you or explained to you your
4 entitlement to retirement welfare benefits?

5 A. Yes, sir.

6 Q. Can you give me the list of the times when that
7 happened and then we'll discuss the times the company did
8 discuss your entitlement to retirement welfare benefits, and
9 then I'll discuss them with you in turn.

10 A. The first time when they first took over in 2007, they
11 took us all in with our spouses and give us orientation on
12 what we were getting.

13 Q. Okay. And I'll come back to that. What was the next
14 time you remember CONSOL explaining to you your entitlement
15 to retirement welfare benefits?

16 A. Annual retraining, they generally went over them.
17 Whenever -- that's whenever we revised our insurance.

18 Q. Were there any other times that you remember CONSOL
19 explaining to you your entitlement to retirement medical
20 benefits?

21 A. When I went to Canonsburg for a retirement seminar.

22 Q. What year, best you recall, did that occur?

23 A. When I went to Canonsburg?

24 Q. Yes.

25 A. Somewhere around 2011 or '12 -- I'm not sure.

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1 Q. And, again, we'll come back to that. I'd like to ask
2 you first about the -- well, just to clarify, there are any
3 other occasions when you remember CONSOL discussing or
4 explaining to you your entitlement to retirement welfare
5 benefits?

6 A. Just when -- whenever we renew our insurance; go
7 through the insurance package and pick out what we wanted
8 and what we would have, and what we was qualified to have.

9 Q. Okay. So let's discuss the first instance that you
10 mentioned, when CONSOL took over the Fola operation. You
11 mentioned they brought you for a meeting. Where did that
12 meeting occur, as you recall?

13 A. At Summersville, I believe it was in the Armory over
14 there.

15 Q. And how many individuals attended that meeting, as best
16 you remember?

17 A. That was employees and their spouses, so between four
18 hundred and five hundred.

19 Q. Who do you remember from CONSOL discussing your
20 retirement or explaining your retirement welfare benefits at
21 that meeting?

22 A. They were out of Pittsburgh. But the one I remember --
23 at the time, I didn't remember his name -- but was Gerald.
24 I don't remember his last name. He's the one that went over
25 our medical. I remember him telling us about his

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1 prescription drugs, what it cost him, and how much he saved
2 by having their insurance.

3 **Q.** Do you know what department that individual was there
4 within CONSOL?

5 **A.** Human Resources.

6 **Q.** And you remember his name was Gerald, but you just
7 can't remember his last name, right?

8 **A.** I'm not good on names.

9 **Q.** That's fine. What, if anything -- well, you said he
10 spoke about retiree welfare benefits. What did he tell you
11 and explain to you about your retirement welfare benefits at
12 that meeting at Summersville?

13 **A.** If we were 55 years of age and we had 10 years'
14 service, we would have our retirement benefits until we died
15 or went on Medicare. And then that Medicare would be our
16 primary, and CONSOL would be our secondary.

17 **Q.** Which specific types of retiree welfare benefits are we
18 discussing -- or, rather, did Mr. -- the individual named
19 Gerald discuss?

20 **A.** Healthcare, and prescription drugs, glasses, dental,
21 life, and medical healthcare, whatever you --

22 **Q.** And as a person, as an official of CONSOL in the HR
23 Department, did you understand that it was, in fact, his job
24 to convey that very type of information about the meaning of
25 the retiree welfare plan terms?

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1 MR. TORRES: Objection; leading, Your Honor.

2 THE COURT: The witness may answer.

3 THE WITNESS: Answer?

4 BY MR. PETSONK:

5 Q. Yes.

6 A. Yes, when the president of the company come and tell
7 you something, you took his word for it. When their
8 representatives come and tell you something, you take their
9 word that they are representing the coal company and telling
10 you what you are going to have.

11 Q. What did you understand was the purpose for which
12 CONSOL called you to that meeting in Summersville?

13 A. To show us what they was giving on replacement on what
14 we had with Fola.

15 Q. And were you required to do anything in order to stay
16 enrolled with the welfare benefits once you retired?

17 A. We had a monthly premium we had to pay.

18 Q. Was that explained also at the Summersville meeting?
19 If you recall?

20 A. I don't recall that.

21 Q. Did you ask any questions of this individual who you've
22 described from the Human Resources Department at the meeting
23 in Summersville? Did you ask any questions of him?

24 A. Yes. I wanted to know for sure that's what he said; 10
25 years and 55 years of age.

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1 Q. What did he say in response to your question?

2 A. He said we would have it. And I started planning my
3 retirement then.

4 Q. Did that individual or anyone else from CONSOL mention
5 at that meeting that CONSOL had the right to terminate your
6 retirement welfare benefits?

7 A. It was never mentioned.

8 Q. All right. You mentioned next, there were annual
9 trainings or annual meetings where CONSOL described your
10 retiree welfare benefits. Where did those meetings
11 customarily occur?

12 A. Well, annual retraining was one for sure, because
13 that's when most of us all were all together then. They
14 come out with something like a medical card or that, do that
15 on the job.

16 Q. Where was the annual retraining located? Where did
17 that take place?

18 A. It wasn't always in the same place. Sometimes it would
19 be at Drennen, sometimes it would be at Summersville.

20 Q. What facility or location at Drennen, West Virginia,
21 are you referring to?

22 A. They have an office building over there.

23 Q. Who does?

24 A. CONSOL.

25 Q. And what, if anything, was said in those annual

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1 meetings about your retirement welfare benefits?

2 **A.** That we would have them.

3 **Q.** How frequent, when you say -- can you say specifically
4 what you recollect -- well, strike that.

5 Who do you recall explaining your retiree welfare
6 benefits at those meetings?

7 **A.** That would be our HR person, Susan Osborn, or Chase
8 Elswick.

9 **Q.** And what do you recall that Susan Osborn and Chase
10 Elswick said about your eligibility to receive retiree
11 welfare benefits at those annual meetings at the Drennen
12 facility of CONSOL?

13 **A.** 10 years and 55 years of age, and we were qualified to
14 have them.

15 **Q.** And what is it that you would qualify to have?

16 **A.** Medical, dental, eye, life.

17 **Q.** Bear with me a second. To clarify, what were Susan
18 Osborn and Chase Elswick, what were their positions with
19 CONSOL?

20 **A.** They are human resource persons.

21 **Q.** And do you understand that it was their job duty to
22 convey that type of information that they did convey as
23 you've testified about the -- about the likely receipt or
24 about the future of your retirement welfare benefits?

25 **A.** Yes, I did.

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1 Q. How many people were typically in attendance at these
2 mine site -- at these meetings at the Drennen site?

3 A. Well, they would bring the whole job in most of the
4 time -- or try to. So 200, 250, sometimes maybe 300.

5 Q. How did they explain the benefits? Was it verbally or
6 did they provide documents to you? By what means did Ms.
7 Osborn and Mr. Elswick explain your entitlement to retiree
8 welfare benefits you referenced at the Drennen Center?

9 A. They would -- at the time the insurance was to be
10 renewed, they would give us packets that we could go through
11 and pick out which type of insurance that best fit our needs
12 for our individual families.

13 Q. What other means did they use to present or explain
14 your benefits?

15 A. They'd just tell us.

16 Q. Verbally?

17 A. Yes.

18 Q. Did Mr. Elswick or Ms. Osborn in these annual or
19 periodic meetings that you've referenced ever explain to you
20 that CONSOL reserved the right to terminate your retiree
21 welfare benefits?

22 A. No, they never.

23 Q. During those -- bear with me a second, Mr. Bright, and,
24 Your Honor.

25 What is the next time that you recollect -- you

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1 referenced a retirement seminar around 2011 or 2012. Is
2 that the next time that you recollect CONSOL describing or
3 explaining your retirement welfare benefits?

4 THE COURT: When you say, "the next time," what's
5 the last time before it?

6 BY MR. PETSONK:

7 Q. When Mr. Elswick -- other than the annual benefit
8 explanations that you've referenced here, are there other
9 times at the mine site or at the CONSOL site there around
10 Fola that you recall CONSOL explaining your entitlement to
11 retiree welfare benefits?

12 A. I don't recall for sure.

13 Q. Okay. And then you referenced a seminar in Canonsburg,
14 Pennsylvania; is that right?

15 A. Yes, sir.

16 Q. And that occurred around 2011 or 2012, as best you
17 recall?

18 A. Yes.

19 Q. How did you learn about that retirement seminar in
20 Canonsburg?

21 A. It was -- CONSOL informed us that we would -- when we
22 turned 55 and eligible for retirement, they advised us to go
23 to that seminar so we could start planning our retirement.

24 Q. So you turned 55 in the year 2010; is that correct?

25 A. Yes, sir.

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1 Q. And when you went to the retirement seminar, in either
2 2011 or 2012, what happened there, as best you recall?

3 A. They brought people in from all parts of the country.
4 It wasn't just coal mines. It was a gas company and
5 everybody. And they give us these big, three-ring binder
6 notebooks and it was divided up into sections for health and
7 retirement, your 401. They even had a part in there about
8 planning a will. They went through each part of the book
9 with us.

10 Q. Do you remember who made the presentation or who
11 reviewed each part of that booklet with you at the
12 Canonsburg seminar?

13 A. Names, I do not. They get up and introduce themselves
14 [sic] and tell us what department they was from.

15 Q. Did the presenters at that seminar review the retiree
16 welfare benefits?

17 A. Yes, sir.

18 Q. Do you remember what department it was that reviewed
19 the retiree welfare benefits?

20 A. It would have been health and resources.

21 THE COURT: The same department you referenced
22 before where Ms. Osborn and Mr. Elswick worked?

23 THE WITNESS: Yes.

24 BY MR. PETSONK:

25 Q. What did that presenter say to you about the retiree

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1 welfare benefits at the seminar in Canonsburg?

2 **A.** Said the medical part, and told us we would have that
3 when we was eligible for it, and we would have it until we
4 went on Medicare or die.

5 **Q.** In presenting the retiree welfare benefits at that
6 seminar in Canonsburg, did the presenter make any statement
7 about CONSOL's right to terminate the retiree welfare
8 benefits?

9 **A.** No, they never.

10 **Q.** And you stated your birthday is in March. Is that
11 correct?

12 **A.** Yes, sir.

13 **Q.** March 6th. And so in 2011, you would have turned 56;
14 is that right?

15 **A.** Yes.

16 **Q.** And so you had already been eligible to retire for
17 nearly a year when you went to that seminar -- nearly a
18 year, at the least; is that right?

19 **A.** Yes. That's when I went, somewhere around that, yes.

20 **Q.** What was the last date you worked for CONSOL?

21 **A.** It was in June of 2013, I believe.

22 **Q.** And did your employment come to a close?

23 **A.** They were having a layoff, and if you took a -- if you
24 take a layoff, you could go ahead and retire and get the
25 insurance for a certain period of time or have a scheduled

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1 layoff. And if you didn't, you had to keep working or lose
2 your benefits or something to that effect. I'm not sure
3 just what they did say.

4 **Q.** How did you learn about those options with regard to
5 your ability to retire after that layoff? How did you learn
6 about those options?

7 **A.** The option about retirement or layoff?

8 **Q.** At the time of the layoff, how did you receive that
9 information about your options to take a voluntary layoff or
10 to retire, as you described?

11 **A.** As well as I remember, they come out to the job and
12 told us we had a certain amount of time we could take the
13 layoff and go ahead and retire.

14 **Q.** When you say they came out on the job, do you remember
15 who it was; who came out and informed you about that?

16 **A.** No, I don't.

17 **Q.** Okay. In that -- was it someone from CONSOL or do you
18 have any recollection about how that -- how that layoff
19 occurred?

20 **A.** No, not really. I know they was having a layoff. And
21 I'm sure it had to come through the human resource people,
22 because they are the ones that took care of all the
23 insurance. To give you a specific name, time and date that
24 happened, I cannot.

25 **Q.** Okay. That's fine. Thank you. And did you also --

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1 did you retire at that time when you were essentially
2 taking that voluntary layoff?

3 **A.** No. Because they give us like a grace period on the
4 insurance. And it was like -- let's see -- at the end of
5 that grace period, I applied for my retirement.

6 (An off-the-record discussion was held between
7 plaintiffs' counsel Petsonk and defense counsel Torres.)

8 MR. TORRES: I am sorry. Is it in your exhibit
9 list?

10 MR. PETSONK: The Deposition Exhibit list.

11 MR. TORRES: Is this exhibit in your exhibit list?

12 MR. PETSONK: The exhibit is the deposition
13 exhibit. You had it, if you want to cross-examine him on
14 it.

15 MR. TORRES: I guess.

16 MR. PETSONK: Your Honor, I presented to the Court
17 an item that I would ask to be marked as Plaintiff's Exhibit
18 9.

19 BY MR. PETSONK:

20 **Q.** Mr. Bright, have you had a chance to receive this
21 document that's been marked as Plaintiff's Exhibit 9?

22 **A.** Yes, sir.

23 **Q.** What does it say at the top of the document? What's
24 the heading there?

25 **A.** "Benefits and Information Sheet."

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1 Q. What does it say in the parenthesis after that?

2 A. Over 10 years and under -- or -- over 55.

3 Q. And then does it have your name at the top of the
4 sheet?

5 A. Yes, sir.

6 Q. And does it say, "Effective Date"?

7 A. Yes, sir.

8 Q. What is the effective date that's listed there?

9 A. 7-1-2013.

10 Q. And is that the date that you recollect being laid off?

11 A. Somewhere around that date. I don't know for sure.

12 Q. Okay. Do you remember seeing this document at that
13 time?

14 A. No, sir, I don't.

15 Q. Okay. Do you remember receiving this document at a
16 later date?

17 A. Not that I remember, no. I don't remember seeing it.

18 Q. Okay. Well then set that document to the side, if you
19 would, please.

20 MR. TORRES: Excuse me.

21 MR. PETSONK: Your Honor, I may refrain from
22 moving this document into evidence at this point.

23 MR. TORRES: I'm fine. Thank you.

24 THE COURT: Mr. Bright, what was your retirement
25 date again?

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1 THE WITNESS: Pardon?

2 THE COURT: Your retirement date?

3 THE WITNESS: According to this, it was 7-1-2013.

4 THE COURT: Well, that's called an effective date.

5 Do you think that's when you did retire?

6 THE WITNESS: I think that's when I took the
7 layoff. And I don't think I retired until May, but I'm not
8 sure.

9 THE COURT: Until when?

10 THE WITNESS: May of that year.

11 THE COURT: Of that year?

12 THE WITNESS: I think, but I'm not a hundred
13 percent sure on that. I don't really remember for sure.

14 THE COURT: May of that year would have come
15 before July 1.

16 THE WITNESS: Okay. Well, I took the layoff in
17 May -- I don't remember the day I did retire.

18 MR. PETSONK: Your Honor, if I may, I could
19 proceed to inquire about his process for retiring?

20 THE COURT: Go ahead.

21 MR. PETSONK: Thank you.

22 BY MR. PETSONK:

23 **Q.** So, Mr. Bright, as you testified, you did not retire at
24 the time you were laid off in July of 2013, right?

25 **A.** No.

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1 Q. And you said you had a grace period from CONSOL in
2 which you continued to receive health insurance after your
3 layoff; is that right?

4 A. Well, as I recollect, yes, sir.

5 Q. And then did you -- was it at a later date that you
6 elected to retire?

7 A. Yes.

8 Q. And if you were laid off in July of 2013, you
9 referenced in May, was that May of the following year, 2014,
10 when you decided that you wanted to retire?

11 A. The date, I couldn't tell you, but it's probably about
12 right, because I --

13 MR. PETSONK: Well, if I may, Your Honor, I'd like
14 to approach with another document?

15 THE COURT: Perhaps you folks could just stipulate
16 the matter?

17 MR. PETSONK: Let me -- if I may, confer with
18 counsel?

19 THE COURT: Go ahead.

20 (An off-the-record discussion was held between
21 plaintiffs' counsel and defense counsel.)

22 MR. TORRES: What's the stipulation?

23 Could I have this -- one second, Your Honor, to
24 look at it?

25 THE COURT: You may.

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1 MR. TORRES: Your Honor, I just want to consult
2 with one of our documents for Mr. Bright. It will take just
3 one second.

4 (Pause.)

5 (An off-the-record discussion was held between
6 plaintiffs' counsel and defense counsel.)

7 MR. TORRES: Your Honor, I'm fine with
8 stipulating. I'm sure there is a date that Mr. Bright
9 retired. This doesn't line up with what my records reflect,
10 and I don't want to stop --

11 THE COURT: You can't stipulate if you are not
12 agreeable to it. I just thought you could work it out
13 quickly, and that's not working out.

14 MR. PETSONK: Well --

15 MR. TORRES: We stipulate that Mr. Bright retired
16 in 2014. The date that's on this document doesn't line up
17 with what I have, but that's --

18 MR. PETSONK: I think we can take that
19 stipulation, Your Honor.

20 THE COURT: Let's go forward with that.

21 MR. PETSONK: Thank you.

22 BY MR. PETSONK:

23 **Q.** Did you have to submit paperwork in order to retire,
24 Mr. Bright?

25 **A.** Yes, we did.

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1 Q. Where did you go to submit that paperwork?

2 A. I don't remember whether I went to the office or
3 whether I had to mail it to Pittsburgh.

4 Q. Whether you mailed it to Pittsburgh --

5 A. I don't remember which one it was.

6 Q. I apologize. Let me take a step back.

7 What did you do in order to activate your retirement?

8 A. I honestly don't remember. I know I had to fill out
9 some paperwork to activate it, but how I went about it, I
10 don't remember.

11 Q. Okay.

12 MR. PETSONK: May I inquire of the Court, where
13 the plaintiffs' prior exhibits are located at this time, if
14 they are on the witness stand or with the clerk?

15 THE COURT: They would primarily be with the clerk
16 or at the witness stand during the course of this witness'
17 testimony.

18 MR. PETSONK: May I see Plaintiff's Exhibit Number
19 1? Thank you.

20 May I approach the witness, Your Honor?

21 BY MR. PETSONK:

22 Q. Mr. Bright, I've presented you with a document that was
23 labeled Plaintiff's Exhibit Number 1. Take a second and
24 look at that document, please.

25 A. (Witness complies.)

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1 Q. Mr. Bright, have you had the opportunity to review that
2 document?

3 A. Just about.

4 Q. After you retired --

5 THE COURT: I think he's still reading it.

6 MR. PETSONK: I'm sorry, Mr. Bright.

7 I'm sorry, Your Honor.

8 THE WITNESS: Okay.

9 BY MR. PETSONK:

10 Q. After you retired, did you receive retiree welfare
11 benefits from CONSOL?

12 A. Yes.

13 Q. What types of coverage did you receive from CONSOL
14 after you retired?

15 A. Medical, dental, eye, life.

16 Q. And what happened next with regard to your retirement
17 healthcare?

18 A. When I retired, I started paying a monthly premium to
19 maintain it.

20 Q. How much was that monthly premium?

21 A. I believe it was \$148 a month.

22 Q. Okay. And did you -- how long did you receive
23 retirement healthcare benefits from CONSOL?

24 A. Until they canceled it in 2015.

25 Q. And I presented you this document that is labeled

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1 "Plaintiff's Exhibit 1." Is this document familiar to you?

2 **A.** Yes.

3 **Q.** Did -- and what does it appear to be?

4 **A.** Where they was going to give us our insurance for
5 another five years, and then cancelled it.

6 **Q.** Is it a letter?

7 **A.** Yes.

8 **Q.** And did you receive this letter?

9 **A.** I believe I did.

10 **Q.** And it says that CONSOL will continue your health
11 insurance until -- until December 31st, 2019; is that right?

12 **A.** Yes, sir.

13 **Q.** When you received this letter, what was your impression
14 from receiving the letter?

15 **A.** Well, honestly, I figured I was getting screwed, but
16 there was nothing I could do about it. If I turned 65 in
17 2020, this run out in December, I could go three months
18 until I was on Medicare.

19 **Q.** I draw your attention to the sentence in the document
20 that says, "As a result and rather than making the
21 termination," -- do you see where I'm reading, in the last
22 paragraph of the document?

23 **A.** Second paragraph?

24 **Q.** Yes, the second paragraph?

25 **A.** Yes, "As a result" -- yes.

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1 **Q.** And so, "As a result and rather than making the
2 termination of retiree group health coverage immediate,
3 CONSOL Energy determined that a transition period of five
4 years would allow retirees and their families an appropriate
5 amount of time to make separate arrangements in a political
6 environment trending towards nationalized healthcare."

7 Is that right?

8 **A.** Yes.

9 **Q.** Is that what the document says?

10 **A.** Yes.

11 **Q.** And what did you understand to be the meaning of that
12 sentence?

13 **A.** I'm supposed to have national healthcare, according to
14 that, until I'm on Medicaid -- or Medicare.

15 **Q.** So did you expect after reading this letter that you
16 would no longer have medical coverage for the rest of your
17 life?

18 **A.** Yes, sir.

19 **Q.** Okay. Did you expect -- did you -- did you try to
20 enroll in government healthcare?

21 **A.** Yes, sir.

22 **Q.** And when you received this letter -- well, strike that.
23 When did you try to enroll in government healthcare?

24 **A.** After I received the second letter.

25 **Q.** Okay.

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1 MR. PETSONK: Let me inquire of the Court whether
2 I could present the witness with Plaintiff's Exhibit Number
3 2?

4 Your Honor, may I present this exhibit to the
5 witness, to the plaintiff?

6 THE COURT: Yes.

7 MR. PETSONK: Thank you.

8 BY MR. PETSONK:

9 Q. I've handed you what is marked Plaintiff's Exhibit
10 Number 2, Mr. Bright.

11 A. Yes, sir.

12 Q. Please take a second and review this document.

13 A. (Witness complies.)

14 Q. Now, as I was questioning you about Plaintiff's Exhibit
15 1, you referenced the second letter?

16 A. Yes, sir.

17 Q. Just to be clear, do you recall when it was that you
18 received this first letter, Plaintiff's Exhibit Number 1?

19 A. Not the exact date, no.

20 Q. Was it after you were receiving retiree welfare
21 benefits?

22 A. Yes, it was.

23 Q. And is there a date listed on the Plaintiff's Exhibit
24 Number 1?

25 A. I don't see a date on it.

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1 Q. Do you recall, roughly, how long after you retired you
2 received that letter?

3 A. No, I don't.

4 Q. Okay. So moving to Plaintiff's Exhibit Number 2, do
5 you recall receiving this letter?

6 A. Yes, sir.

7 Q. And there is a date on the top of this Plaintiff's
8 Exhibit Number 2, isn't there?

9 A. Yes.

10 Q. And what is that date?

11 A. June 16th, 2015.

12 Q. Do you recall receiving this letter around that time?

13 A. Yes.

14 Q. And you mentioned that when you received -- well, you
15 mentioned that when you received the second letter, you did
16 try applying for government healthcare benefits; is that
17 right?

18 A. Yes, sir.

19 Q. Is it this letter that you're referring to that
20 triggered your application for federal benefits?

21 A. Yes.

22 Q. And what happened when you looked into the federal --
23 the federal healthcare benefits?

24 A. I couldn't afford it.

25 Q. How much were those federal -- well --

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1 **A.** About \$1,200 a month.

2 **Q.** Okay. And the federal healthcare benefits would have
3 cost you \$1,200 a month; is that right?

4 **A.** Yes.

5 **Q.** In Plaintiff's Exhibit Number 2, the letter dated June
6 16, 2015, what does it say, if anything, about CONSOL's
7 continuation of retirement welfare benefits?

8 **A.** Doing away with them.

9 **Q.** If you look in the first paragraph there, Mr. Bright,
10 it references a date of December 31st, 2015. Do you see
11 that?

12 **A.** Yes, sir.

13 **Q.** What does the letter convey regarding that date?

14 **A.** Retiree Healthcare Reimbursement Account Plan CRHRA
15 will terminate December 31st, 2015.

16 **Q.** Did you understand that to apply to the retiree welfare
17 benefits that you were then receiving?

18 **A.** Yes, sir.

19 **Q.** And did you, in fact, lose your retiree welfare
20 benefits?

21 **A.** Yes, I did.

22 **Q.** On December 31st of 2015?

23 **A.** Yes, I did.

24 **Q.** Did CONSOL provide you with any terminal or final
25 benefit at the time that they ended your retiree welfare

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1 benefits on December 31, 2015?

2 **A.** No, they didn't.

3 **Q.** When CONSOL terminated your retiree welfare benefits,
4 what did you do for healthcare -- to secure healthcare
5 insurance or healthcare coverage at that time?

6 **A.** I checked on Obamacare, and I couldn't afford it. So I
7 opted to pay the fine for the rest of that year and go
8 without insurance.

9 **Q.** How much were you required to pay a fine for not having
10 health insurance at that time, Mr. Bright?

11 **A.** A hundred dollars a month.

12 **Q.** And for how many months did you pay that fine?

13 **A.** Three months.

14 **Q.** And did you secure health care then at that point?

15 **A.** Yes.

16 **Q.** And what sort of -- when I say healthcare, I mean
17 healthcare insurance. And what sort of insurance did you
18 secure at that point in 2016?

19 **A.** My wife is a retired school teacher, and she had kept
20 enough of her life insurance through the PEIA where we could
21 go back and pick her insurance up and be covered under it.

22 **Q.** You said that she retained life insurance; is that what
23 you mean there or do you mean medical insurance?

24 **A.** Well, before -- when she cancelled her insurance, the
25 lady advised her to keep the life insurance policy through

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1 PEIA, because if something ever happened, she could come
2 back and pick up her medical. That's what we did.

3 **Q.** So she -- she had retained life insurance, but because
4 of that retention, you were able to go back and get onto a
5 medical insurance plan through your wife's PEIA insurance;
6 is that right?

7 **A.** That's right.

8 **Q.** And since -- did the PEIA insurance cover dental and
9 vision costs?

10 **A.** No.

11 **Q.** Since you lost your CONSOL retiree health insurance,
12 have you paid out-of-pocket for dental and vision?

13 **A.** Yes.

14 **Q.** And how much would you estimate you paid for dental
15 costs since you lost your CONSOL retiree health insurance?

16 **A.** Probably \$3,000.

17 **Q.** And how much have you estimated that you paid for
18 vision?

19 **A.** \$1,500.

20 **Q.** And that's during the years since you lost your retiree
21 insurance from CONSOL, right?

22 **A.** Yes.

23 **Q.** And what did you do in order to develop those numbers
24 of your losses?

25 **A.** My wife went through the checkbook and credit card

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1 receipts and added up how much we paid out-of-pocket.

2 **Q.** Did you expect to have those medical expenses, that is,
3 including the dental and vision services covered by your
4 CONSOL retiree welfare benefits?

5 **A.** Yes.

6 MR. PETSONK: Your Honor, other than to briefly
7 confer with my co-counsel -- if I may?

8 (Pause.)

9 MR. PETSONK: Your Honor, at this point, I will
10 conclude my questioning of the witness. And I would note
11 I'm not moving to admit Plaintiff's Exhibit -- 9, is it?
12 The Plaintiff's Exhibit 9 which I tendered, I do not move
13 for its admission at this time.

14 MR. TORRES: May I have just one moment, Your
15 Honor?

16 THE COURT: You may.

17 MR. TORRES: I apologize, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MR. TORRES:**

20 **Q.** Mr. Bright, you said you started at CONSOL in 2007; is
21 that correct?

22 **A.** Yes.

23 **Q.** And when you were working for AMVEST or Fola, before
24 you became employed by CONSOL, did that company have retiree
25 medical benefits?

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1 **A.** No.

2 **Q.** And do you recall how soon after you started working at
3 CONSOL in 2007 that you were put on CONSOL's benefits?

4 **A.** The exact period of time, I can't tell you. It was
5 shortly after CONSOL took over.

6 **Q.** But it wasn't immediately; is that correct?

7 **A.** Not the same day, no.

8 **Q.** You don't recall?

9 **A.** Within a short period of time.

10 **Q.** Okay. And however long that period of time was, in
11 order to explain to you CONSOL's benefits, they invited you
12 to a meeting in Summersville; is that correct?

13 **A.** Yes, sir.

14 **Q.** And some person named Gerald, whose last name you can't
15 remember, allegedly told you in that meeting that you would
16 have benefits for life; is that correct?

17 **A.** That's right.

18 **Q.** Okay. And -- well, did he say, for life, or did he say
19 until you died or went on Medicare? Just so we are clear.

20 **A.** Until you died or went on Medicare.

21 **Q.** So he didn't say until life; he said, until you died
22 and went or Medicare?

23 **A.** What's the difference between life and death?

24 **Q.** I'm just trying to understand what your testimony is,
25 sir.

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1 **A.** Okay.

2 THE COURT: Please just listen to the question and
3 answer it, if you would.

4 And you can restate it.

5 MR. TORRES: You want me to restate it, Your
6 Honor?

7 THE COURT: I think you should ask the question
8 again and get the answer.

9 BY MR. TORRES:

10 **Q.** Your testimony was that the gentleman said you would
11 have retirement benefits until you died, correct -- well,
12 let me back up. I didn't mean to confuse things, sir.

13 Did the gentleman named Gerald -- just so I'm clear --
14 at this meeting in Summersville, said that once you hit 55
15 and 10 years of service, you would have retirement benefits
16 until you died; is that correct?

17 **A.** Yes.

18 **Q.** Okay. My apologies. And then you said that you had
19 annual meetings where Susan Osborn and Chase Elswick spoke;
20 is that right?

21 **A.** Yes.

22 **Q.** And about how many meetings do you recall that you
23 attended where Mr. Elswick and Ms. Osborn spoke about
24 benefits?

25 **A.** The yearly meeting we would have for sure, but other

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1 than that, I can't speculate how many other than that, but I
2 know at least one a year.

3 **Q.** Okay. So your recollection is there was this
4 once-a-year meeting, and that's where they spoke about
5 benefits, correct?

6 **A.** Yes.

7 **Q.** And unlike the meeting in Summersville, neither Ms.
8 Osborn nor Mr. Elswick ever told you that you would have
9 your benefits for life, correct?

10 **A.** Well, they said we would have them. They didn't say
11 exactly for life. They said we would have them. And led me
12 to believe that that's what I would have.

13 **Q.** I didn't catch the last part of that?

14 **A.** Leading me to believe that's what I had.

15 **Q.** Well, I'm interested in what they said. So you agree
16 -- your testimony is that they said you would have benefits;
17 they did not say they that you would have them for life,
18 correct?

19 **A.** Well, not life, no. They said we would have them until
20 we was -- what they led me to believe, that I would have
21 them until I was dead. They didn't just say until I was
22 dead, no.

23 **Q.** Well, you remember, you and I spoke at your deposition,
24 correct?

25 **A.** Yes, sir.

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1 Q. And do you recall testifying at your deposition that
2 you don't recall Ms. Osborn using the word "lifetime" or
3 making any promises about your benefits, correct?

4 A. I don't remember exactly what I told you, but if you
5 got the deposition, that's what I said.

6 Q. Okay. Well, why don't we be clear about it just so
7 there is not any confusion in the record here.

8 MR. TORRES: May I approach, Your Honor?

9 THE COURT: You may.

10 BY MR. TORRES:

11 Q. Mr. Bright, I'm going to hand you a copy of your
12 deposition. And if you look at the second page in the
13 document, it says, this is a video deposition of Clarence
14 Bright, correct?

15 A. Second page. Yes.

16 Q. And it says that you testified on May 23rd, 2017,
17 correct?

18 A. Yes.

19 Q. And you were under oath that day?

20 A. Yes.

21 Q. And you swore to tell the truth, correct?

22 A. Yes, sir.

23 Q. And if you turn to page 44 of your deposition -- let me
24 know when you are there.

25 A. Okay.

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1 **Q.** And Line 9 at that page, I asked you: "To the best of
2 your recollection, what do you recall Ms. Osborn saying?
3 Did she ever use the word "Lifetime"?

4 Do you see that question?

5 **A.** Yes.

6 **Q.** And your answer was, "I don't remember," correct?

7 **A.** Yes.

8 **Q.** And I asked you at Line 13: "What do you remember Ms.
9 Osborn saying?"

10 Do you see that?

11 **A.** Yes.

12 **Q.** And you testified: "She just went over the benefit
13 package with us at our annual retraining and stuff
14 sometime," correct?

15 **A.** Yes.

16 **Q.** And then I asked you Line 17: "You don't remember her
17 using the word 'Lifetime,'" correct?

18 And you said: "That's right."

19 Do you see that?

20 **A.** Yes, sir.

21 **Q.** And then at Line 20, I said: "Do you remember her
22 making any other promises to you other than just simply
23 explaining to you what your benefits were?"

24 And your answer was: "No."

25 Correct?

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1 **A.** Yes.

2 **Q.** So Ms. Osborn didn't make you any promises regarding
3 your benefits, correct, Mr. Bright?

4 MR. PETSONK: I'm going to object to the question,
5 Your Honor. I think it's mischaracterizing the testimony
6 here, but --

7 THE COURT: You may continue with your question.

8 BY MR. TORRES:

9 **Q.** Is that correct, Mr. Bright?

10 **A.** Repeat it, please. Repeat it.

11 **Q.** I said, Ms. Osborn, according to your sworn testimony
12 at your deposition, didn't make any promises regarding your
13 benefits, correct?

14 **A.** She didn't promise me, no.

15 **Q.** And she didn't use the word "Lifetime" in describing
16 your benefits, correct?

17 **A.** Not to my recollection, no.

18 **Q.** Okay. And, similarly, Mr. Elswick didn't make you any
19 promises of lifetime benefits, correct?

20 **A.** No.

21 **Q.** No?

22 **A.** He didn't promise me nothing.

23 **Q.** I'm sorry. I'm having a hard time hearing you.

24 **A.** He never promised them, no.

25 **Q.** Okay. And he didn't use the word "Lifetime" in

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1 describing your benefits, correct?

2 **A.** I don't think so, no.

3 **Q.** Okay.

4 **A.** Not that I can remember, no.

5 **Q.** Okay. Thank you. All right. So then you said that
6 you attended a retirement seminar just before you were
7 getting ready to retire, correct?

8 **A.** Yes.

9 **Q.** That took place in Pennsylvania?

10 **A.** Yes.

11 **Q.** And you said that they handed out some information to
12 describe your retiree medical benefits, correct?

13 **A.** They did, yes.

14 **Q.** It was a Summary Plan Description?

15 **A.** Yes.

16 **Q.** Okay. And you said in your testimony a moment ago they
17 reviewed that Summary Plan Description with you during that
18 meeting, correct?

19 **A.** Yes.

20 **Q.** And you recall I showed you that document at your
21 deposition, correct?

22 **A.** Yes.

23 **Q.** And you agree that that document, among other things,
24 stated that CONSOL reserved the right to terminate its
25 benefits at any time, correct?

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1 **A.** It was in small print, but it was not how -- like all
2 the benefits was. They kind of hid it back, but, yes, it
3 was in there.

4 **Q.** Yes or no, that it stated that, sir?

5 **A.** Yes.

6 **Q.** It did, correct?

7 **A.** After you pointed it out to me. I never read it up
8 there.

9 **Q.** Okay, well, let's do that. Let's see how fine the
10 print is.

11 MR. TORRES: Could I have just one moment, Your
12 Honor?

13 THE COURT: You may.

14 MR. TORRES: May I approach, Your Honor?

15 BY MR. TORRES:

16 **Q.** Mr. Bright, I'm showing you what's been marked as
17 Defendant's Exhibit 16. And this document on the first page
18 says, "CONSOL Energy Summary Plan Description," correct?

19 **A.** Yes.

20 **Q.** And below that, it says, Production and Maintenance
21 Employees at AMVEST, West Virginia Coal, correct?

22 **A.** Yes.

23 **Q.** And that's where you worked, correct?

24 **A.** Yes.

25 **Q.** Do you see on the bottom of the document there is the

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1 words "CONSOL," and then some numbers?

2 **A.** Yes.

3 **Q.** Can you turn to CONSOL 005609, please. I'm sorry.

4 Turn to CONSOL 005611.

5 **A.** Okay.

6 **Q.** And under the words, "Plan Overview," it says, "The

7 CONSOL Energy Inc. Retiree Medical and Prescription Drug

8 Expense Benefits Plan." Do you see that?

9 **A.** Yes.

10 **Q.** And at the bottom of the page under page 1, it says,

11 "Retiree Medical and Prescription Drug Plan SPD P&M AMVEST,"

12 correct?

13 **A.** Yes.

14 **Q.** This is the document I showed you at your deposition,

15 correct?

16 **A.** Yes.

17 **Q.** And you agree that you received this during your

18 retirement seminar, correct?

19 **A.** Yes.

20 **Q.** And when you attended that retirement seminar, you were

21 retirement eligible, correct?

22 **A.** Yes.

23 MR. TORRES: I'm sorry, 15, Josh?

24 THE CLERK: 16.

25 Defendants offer Exhibit 16, Your Honor.

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1 THE COURT: Any objection?

2 MR. PETSONK: No, Your Honor. No objection.

3 THE COURT: Admitted.

4 **Defendant's Exhibit 16 admitted.**

5 BY MR. TORRES:

6 **Q.** Now, you said that this document was reviewed during
7 the retirement seminar, correct?

8 **A.** Yes.

9 THE COURT: Is it agreed when that would have
10 been?

11 BY MR. TORRES:

12 **Q.** Do you remember, approximately -- I think you testified
13 that you attended the seminar in either 2010 or 2011,
14 correct?

15 **A.** I forget the exact date. Somewhat right in there, I
16 went to that.

17 **Q.** Okay.

18 MR. PETSONK: Your Honor, if you're entertaining a
19 stipulation, we can stipulate to 2011.

20 THE COURT: How does that relate to Canonsburg?

21 MR. TORRES: I'm sorry, sir.

22 THE COURT: How does this relate to Canonsburg?

23 MR. TORRES: This is the document he testified was
24 handed out to him when he attended the retirement seminar in
25 Canonsburg.

BRIGHT - CROSS

1 THE COURT: That was in 2011, 2012, according to
2 the witness' testimony, so I guess you are agreeing to that?

3 MR. TORRES: Yes, Your Honor.

4 THE COURT: Very good. Go ahead.

5 BY MR. TORRES:

6 Q. And in sticking with the numbers at the bottom of the
7 page, these pages, if you could turn to CONSOL 5 -- 005667.
8 Do you see that?

9 A. Yes, sir.

10 Q. And at the top of that page, there is a section that
11 says, "Future of the Plan"?

12 A. 5667?

13 Q. Right below that?

14 A. Future plan, yes.

15 Q. Okay.

16 THE COURT: What is the page number?

17 MR. TORRES: CONSOL 005667.

18 THE COURT: Thank you.

19 BY MR. TORRES:

20 Q. And the second -- there is some text on this page that
21 is bigger than the rest of the text, correct?

22 A. Yes.

23 Q. And the second set of words that are bigger than the
24 rest of the text are the ones that say, "Future of the
25 Plan," correct?

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1 **A.** Yes.

2 **Q.** And under that it says, "The Board of Directors of
3 CONSOL can amend, modify, suspend, or terminate all or part
4 of the Plan at any time," correct?

5 **A.** Yes.

6 **Q.** And that text is the same as the text below it,
7 correct?

8 **A.** Yes.

9 **Q.** And other than the heading, it's the same size text of
10 the other words on these pages, correct?

11 **A.** Yes.

12 **Q.** Okay. Now, in addition to the document you just
13 testified to, you received other documents even before you
14 went to Canonsburg for CONSOL that we reviewed at your
15 deposition that included reservation of rights language,
16 correct?

17 **A.** I don't understand what you're saying.

18 **Q.** Even before you went to Canonsburg in 2011-2012, and
19 you received the document that we were just looking at,
20 which included a reservation of rights language, prior to
21 that, you received other documents from CONSOL that also
22 included reservation of rights language that we reviewed at
23 your deposition, correct?

24 **A.** I don't remember reading that in any of them. The only
25 time I remember reading it is when you showed it to me in

BRIGHT - CROSS

1 the deposition.

2 **Q.** Okay. You admitted receiving documents at your
3 deposition?

4 **A.** Yes.

5 **Q.** I showed you documents at your deposition that you
6 recalled receiving?

7 **A.** Yes.

8 **Q.** And you agreed that each of those documents contained
9 reservation of rights language -- whether or not you read
10 it, sir, you agreed that those documents you received
11 contained reservation of rights language, correct?

12 **A.** No. I never seen it in them. I'm taking your word
13 that it's in there. But I never let them personally tell
14 you they was in there.

15 **Q.** Okay.

16 MR. TORRES: Could I have Defendant's Exhibit 3?
17 Thank you.

18 May I approach, Your Honor?

19 THE COURT: Yes.

20 MR. TORRES: Let me give that back to you.

21 BY MR. TORRES:

22 **Q.** Mr. Bright, I'm going to show you what's been marked as
23 Defendant's Exhibit 17. This document states on the front
24 page on the right side, "Your 2009 Flexible Benefits
25 Enrollment Guide," correct?

BRIGHT - CROSS

1 **A.** Yes.

2 **Q.** And below that, it says, "CONSOL Energy," correct?

3 **A.** Yes.

4 **Q.** And you recall me showing you this document at your
5 deposition?

6 **A.** If you showed me -- I don't recall. I don't recall
7 which documents you showed me. I'm sure you showed it to
8 me, but as far as me saying, yes, you give it to me -- I
9 can't say that.

10 **Q.** You still have your deposition transcript, Mr. Bright?

11 **A.** Yes, sir, I do.

12 **Q.** So if you could turn to Page 59 of your deposition.
13 Well, actually, I'll withdraw that question.

14 Before you received the retiree SPD that we entered
15 into evidence, you recall at your deposition you testified
16 you also received a similar document that applied to active
17 employees, correct?

18 **A.** Applied to, what?

19 **Q.** To when you were an active employee?

20 **A.** Yes.

21 **Q.** Okay. And that document, like the retiree document,
22 that SPD we looked at, included reservation of rights
23 language, correct?

24 **A.** I -- if you are telling me it's in there, it's in
25 there. I never looked at it and read it, no.

BRIGHT - CROSS

1 Q. Well, the document says what it says.

2 So you would agree with me, Mr. Bright, that after this
3 gentleman named Gerald made this statement at the meeting in
4 Summersville, you received documents from CONSOL that stated
5 in writing that they reserved the right to terminate your
6 benefits, correct?

7 A. It was possibly in there, but I never read them
8 documents. What I read in them documents was the benefit
9 plan they was telling me I would have. And to go through
10 and read all the fine print -- it didn't really interest me.
11 Because they was telling me I would have my retirement, my
12 medical benefits, my life insurance, my health, dental, if I
13 had 55 years' service -- 55 years of age and 10 years'
14 service. And I didn't have no reason to question it.
15 It's -- whatever they done as far as the insurance, it was
16 what they said it was.

17 Q. My question, sir, was: After this gentleman Gerald
18 made the statements that you claim he made in Summersville,
19 CONSOL sent you documents, that you admitted receiving, that
20 included language that said they reserve the right to
21 terminate the benefits, correct?

22 A. I'm telling you I never read it in there. If it's in
23 there, it's in there. But I never seen it.

24 Q. Sir, I'm not asking you if you read it.

25 You saw the document and admitted what it said, and

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1 you've admitted you received it. So, yes or no, you
2 received the document and it includes reservation of rights
3 language?

4 MR. PETSONK: Your Honor, I'm going to object.
5 This question has been asked and answered quite a number of
6 times at this point.

7 THE COURT: Overruled.

8 THE WITNESS: I received the documents, yes.

9 BY MR. TORRES:

10 Q. Thank you. And you said that after you lost your
11 benefits from CONSOL, you were going to sign up for what you
12 called Obamacare, but it was too expensive, correct?

13 A. Yes, sir.

14 Q. And that was \$1,200 a month; did I get that right?

15 A. Yes.

16 Q. Okay. And then you paid the penalty, and then you went
17 on your wife's insurance, correct?

18 A. Yes.

19 Q. And did you -- have you attempted to quantify how much
20 out-of-pocket expenses you incurred as a result -- and I
21 apologize if you testified to this. I may have missed it
22 earlier. The total amount you claim you are out-of-pocket
23 as a result of losing these benefits?

24 A. Somewhere around \$28,000.

25 Q. And the \$28,000, what does that -- I mean, can you be

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1 more specific as to what that consists of?

2 **A.** Well, \$2,500 for glasses, and I think it was around
3 \$4,000 for dental work. And the rest of it was where I had
4 to pay almost \$500 a month for insurance, hospitalization,
5 or --

6 **Q.** So most of it is \$500 a month for insurance, correct?

7 **A.** Mm-hmm.

8 **Q.** Do you know how much per month you were paying at
9 CONSOL for medical?

10 **A.** \$148 a month.

11 **Q.** \$148?

12 **A.** Yes.

13 **Q.** So is that \$28,000, the difference between the \$148 and
14 the \$500, you're subtracting the amount you paid to CONSOL?

15 **A.** No. That's what I had to pay out-of-pocket, and
16 instead of \$500 a month -- let's see here -- trying to
17 remember how my wife explained that to me.

18 **Q.** So you are not sure if the \$28,000 is minus the amount
19 you would have had to pay to have CONSOL insurance? Is that
20 fair?

21 **A.** Fair enough, yes.

22 **Q.** Okay. So it could be less than 28; we'd have to deduct
23 the amount you paid to CONSOL, but that's something your
24 wife calculated, and you are not sure how she did it?

25 **A.** It could be \$148, sir. It could be \$148 more. I'm not

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1 sure what she said.

2 THE COURT: Just a moment. Mr. Bright, would you
3 pull the microphone closer to you?

4 THE WITNESS: Is that better?

5 THE COURT: It probably will be. Let's see.

6 BY MR. TORRES:

7 Q. Okay. Mr. Bright, so this gentleman by the name of
8 Gerald that you testified about, who used the
9 word "Lifetime," you would agree no one ever told you that
10 Gerald had the authority to change the terms of CONSOL's
11 written benefits plan, correct?

12 A. I don't know he had a change, but he was telling us
13 what he represented.

14 Q. That wasn't my question, Mr. Bright. No one told you
15 that Gerald had the authority to alter the terms of CONSOL's
16 written benefits plan, correct?

17 A. No. Why would he? I wouldn't know why he would try to
18 change it, no.

19 Q. Okay. So no one ever told you that, correct?

20 A. No.

21 Q. And no one -- Gerald never told you that he had the
22 authority to change the terms of CONSOL's written benefits
23 plan, correct?

24 A. No.

25 Q. And CONSOL never gave you any written material stating

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1 that Gerald had the authority to change the terms of
2 CONSOL's written benefits plan, correct?

3 **A.** No.

4 **Q.** And no one ever told you that -- I'm sorry.

5 You don't have any knowledge that CONSOL ever told
6 Gerald to lie to you about CONSOL's written benefit plan,
7 correct?

8 **A.** No.

9 **Q.** And you have no knowledge that CONSOL ever told Gerald
10 to make any misrepresentation to you about CONSOL's written
11 benefits plan, correct?

12 **A.** No.

13 **Q.** And you don't know if anyone from CONSOL told Gerald to
14 promise you lifetime benefits, correct?

15 **A.** No.

16 **Q.** And you don't know if anyone from CONSOL told Gerald to
17 make any misrepresentations to you, correct?

18 **A.** No.

19 MR. TORRES: One minute, Your Honor.

20 (Pause.)

21 (An off-the-record discussion was held between the
22 defense attorneys.)

23 BY MR. TORRES:

24 **Q.** One last thing, Mr. Bright. You were testifying about
25 the fact you were paying \$500 a month for insurance?

BRIGHT - REDIRECT

1 **A.** Yes.

2 **Q.** You're not paying that still, because you are on
3 Medicare, correct?

4 **A.** I'm still paying a premium, but I don't know what it
5 is, no.

6 **Q.** So your current premium isn't \$500?

7 **A.** I don't believe so. But I'm not sure what it is.

8 **Q.** You are not sure what it currently is?

9 **A.** No.

10 **Q.** And do you remember when you stopped paying the \$500
11 per month? Is that when you went on Medicare?

12 **A.** Yes.

13 **Q.** Okay. Thank you, Mr. Bright.

14 MR. TORRES: Thank you, Your Honor. Nothing
15 further.

16 MR. PETSONK: Your Honor, thank you.

17 **REDIRECT EXAMINATION**

18 **BY MR. PETSONK:**

19 **Q.** Mr. Bright, as to your out-of-pocket expenses after
20 CONSOL terminated your retiree welfare insurance, you
21 testified that you had paid about \$3,000 of dental costs; is
22 that right?

23 **A.** Yes.

24 **Q.** And about \$1,500 for vision purposes; is that right?

25 **A.** I think so, yes.

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1 MR. PETSONK: Your Honor, I don't think I have any
2 further questions at this time. Thank you.

3 MR. TORRES: Nothing further, Your Honor.

4 THE COURT: Is Defendant's 17 to be moved?

5 MR. TORRES: I'm sorry, Your Honor. Defendants
6 will move Defendant's 17.

7 MR. PETSONK: No objection.

8 THE COURT: Admitted.

9 **Defendant's Exhibit 17 admitted.**

10 THE COURT: May Mr. Bright be excused?

11 MR. PETSONK: Yes. Mr. Bright may be excused,
12 yes. Thank you, Your Honor.

13 MR. TORRES: Yes, Your Honor.

14 THE COURT: Mr. Bright, you're excused. Let me
15 caution you, however, not to discuss your testimony with any
16 other witness in this case except the other parties, the
17 plaintiffs in the case --

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: -- until the trial is over.

20 THE WITNESS: Yes.

21 THE COURT: If you need any relief from that
22 direction, you or your attorney can let me know.

23 THE WITNESS: Thank you.

24 THE COURT: Thank you, sir. And I'm going to ask
25 you to follow me out of the courtroom when we recess here in

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1 a moment. And we'll go through that door, and I'll have you
2 go on out through that chamber.

3 Do the parties have anything further at the moment?

4 MR. TORRES: Nothing, Your Honor.

5 MR. PETSONK: Your Honor, I just wanted to advise
6 Your Honor that I think the next witness we intend to
7 present will be Mike Hymes, which is -- which is one out of
8 order from what we had expressed at the outset. We are
9 changing the order to accommodate the schedule of the
10 witnesses, if that's agreeable to Your Honor.

11 THE COURT: It is alright with me, and I take it
12 is with the defendant as well?

13 MR. TORRES: Yes, Your Honor.

14 THE COURT: So we'll return with him. And perhaps
15 he can be on the witness stand when we return in 15 minutes
16 at a quarter till.

17 And thank you, sir.

18 THE WITNESS: Thank you.

19 THE CLERK: All rise.

20 (A recess was taken at 3:30 p.m. until 3:47 p.m.)

21 THE CLERK: All rise.

22 THE COURT: Good afternoon. Please be seated.

23 And I take it the next witness is in the chair, ready to go?

24 MR. PETSONK: Yes, Your Honor.

25 THE COURT: And if you'll state your full name,

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1 please.

2 MR. HYMES: Dean Michael Hymes.

3 THE COURT: And he may be sworn.

4 THE CLERK: Mr. Hymes, if you would please raise
5 your right hand.

6 **DEAN MICHAEL HYMES, PLAINTIFF'S WITNESS, SWORN**

7 THE CLERK: Please spell your name for the record.

8 THE WITNESS: H-Y-M-E-S.

9 **DIRECT EXAMINATION**

10 **BY MR. PETSONK:**

11 **Q.** Good afternoon, Mr. Hymes. What is your occupation?

12 **A.** I'm a human resource consultant.

13 **Q.** And who is your employer?

14 **A.** I'm currently self-employed.

15 **Q.** How long have you been self-employed?

16 **A.** A little over five years, I think.

17 **Q.** Who employed you before that?

18 **A.** Before that was James River Coal Company.

19 **Q.** And what was your position with James River Coal
20 Company?

21 **A.** Corporate Human Resources Director.

22 **Q.** How many years of experience do you have all together
23 as a director or otherwise as a senior manager of human
24 resources in the Appalachian coal industry?

25 **A.** Probably 20 years.

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1 Q. Were you ever employed by CONSOL?

2 A. Yes.

3 Q. What years were you employed by CONSOL?

4 A. I was employed from February of 1972 until January
5 1993, I think was the date. Might be in August. I can't
6 remember for sure.

7 Q. Were you employed in the Human Resources function
8 throughout that time?

9 A. Yes.

10 Q. And where geographically did you work for CONSOL?

11 A. My area of coverage was the Southern Appalachian
12 Region, which included Tennessee, Virginia, and Southern
13 West Virginia, and Eastern Kentucky.

14 Q. Did you also perform work for CONSOL in any other
15 regions?

16 A. I worked for Fairmont Supply as a manager of employee
17 development, and that was all over the country at their
18 warehousing areas.

19 Q. What was the senior most position that you held in the
20 Human Resources function for CONSOL?

21 A. I was Regional Manager of Human Resources for Southern
22 Appalachian Region.

23 Q. And we may revisit the particular chronology of your
24 employment, but for sake of brevity, I'd like to ask you, as
25 it relates to employee benefits in Human Resources, what job

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1 duties did you hold during the time that you worked for
2 CONSOL? If you can summarize the job functions you held
3 during that employment?

4 **A.** As it applies to benefits or --

5 **Q.** Yes.

6 **A.** -- the entire function? To benefits, the benefits
7 manager worked directly for me. It was my overall
8 responsibility to ensure the benefits were being managed and
9 administered properly. We tried to manage the costs, and
10 developed whatever new benefits that we might want to
11 recommend to Pittsburgh for approval in our package.

12 **Q.** What other job functions did you hold as a Human
13 Resources officer for CONSOL?

14 **A.** As the senior HR person in Southern App, I had
15 responsibility for employee -- employee development reported
16 to me, the benefits function reported to me. The salary
17 payroll function reported to me. The employment function
18 reported to me. And the industrial relations and union
19 avoidance function reported to me also.

20 **Q.** When you say, "union avoidance," did CONSOL have both
21 union and nonunion or union-free operations during the time
22 that you worked there?

23 **A.** Yes. We were double-breasted. We had union
24 operations, and we had union-free operations.

25 **Q.** When you first began to work for CONSOL in 1972, did

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1 you have nonunion or union-free operations at that time?

2 **A.** 1972, we were totally represented by the UMWA.

3 **Q.** What was the first union-free operation that you were
4 involved with for CONSOL, either directly or indirectly,
5 through your work in Human Resources?

6 **A.** Well, the first one we were involved with was working
7 on just input into the Navajo Reservation Burnham operation.
8 And that was basically input as senior HR person in the
9 company, there were several of us, and we were all asked for
10 input. But that was the first one that I was involved with.

11 **Q.** What was the next union-free operation that you were
12 involved with as a Human Resources officer with CONSOL?

13 **A.** Well, the next one would have been Buchanan One. Now
14 it's Buchanan, but we called it Buchanan One.

15 **Q.** And where is that located?

16 **A.** It's located in Buchanan County, Virginia.

17 **Q.** I'll come back and ask you about these. What was the
18 next union-free operation you were involved with at CONSOL?

19 **A.** I guess the next one would have been our Eastern
20 Kentucky operations, where we made an acquisition of an
21 existing union-free operation that was owned by Utah
22 International, and we acquired that union-free location.

23 **Q.** And was that -- you said that's in Eastern Kentucky?

24 **A.** Yes.

25 **Q.** And was there a principal mine operation that you

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1 referred to or think of as being involved in that
2 acquisition?

3 **A.** Originally, it was the operation located in David,
4 Kentucky. And we just called it Eastern Kentucky
5 operations. It also included undeveloped property, which
6 later became the Jones Fork operation of CONSOL.

7 **Q.** Thank you. And then what was the next union-free
8 operation that you were involved with as a Human Resources
9 officer for CONSOL?

10 **A.** Well, directly involved with -- indirectly involved
11 with the Bailey operation and the Enlow operation, both; I
12 had input into those programs, but they were not my direct
13 responsibility.

14 **Q.** When you say you had input into those programs, please
15 describe what you mean. What was the nature -- let me ask
16 you this: What was your involvement with those programs?

17 **A.** Well, when CONSOL was 100 percent union, they had no
18 experience at union-free operations. And we, as a group,
19 did a great deal of research; visited other union-free
20 operations, trying to figure out what the secret was, I
21 guess you could say.

22 MR. TORRES: Object. I'm sorry.

23 Are you finished, sir?

24 THE WITNESS: No.

25 MR. TORRES: Okay.

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1 THE WITNESS: And we would -- we put together the
2 strategy for the union-free operations for CONSOL, including
3 Buchanan, Bailey, Enlow, et cetera.

4 MR. TORRES: Your Honor, move to strike. He lacks
5 foundation to testify on behalf of CONSOL. He can't testify
6 as to what other individuals could do. He could testify as
7 to what he said and did, but that was testimony as to other
8 individuals, purportedly, on behalf of CONSOL.

9 THE COURT: When you said, "We as a group," what
10 did you mean by that?

11 THE WITNESS: Well, there were regions in the
12 company: The Southern Appalachian Region, the Eastern
13 Region, the Northern West Virginia Region, the Midwest
14 Region. Each had a senior HR person, like me, and we would
15 all work together for the executive vice president on
16 developing the strategy for Human Resources for CONSOL.

17 MR. TORRES: Your Honor, he identified four
18 union-free operations he was -- he claims to have been
19 involved in. He's laid no foundation as to what these other
20 individuals did or didn't do. And the tone of his testimony
21 was to purport to say, here's what CONSOL was thinking or
22 doing. And there is no foundation for that.

23 MR. PETSONK: Your Honor, if I may develop? I
24 intended to ask him more about who was involved and what the
25 nature of his knowledge and involvement was during this

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1 process, his personal knowledge.

2 THE COURT: Well, lay a foundation. And then once
3 you get finished with it, see whether or not Mr. Torres
4 still has an objection.

5 BY MR. PETSONK:

6 **Q.** You've mentioned various department heads that you
7 managed and the Human Resources functions that you managed.
8 Who did you report to above you in CONSOL while you were
9 a -- during this period, when you described developing the
10 union-free operations at Burnham, Buchanan, Eastern
11 Kentucky, Bailey and Enlow Mines?

12 **A.** My direct supervisor was the Senior Vice President of
13 Mining, Eustace Frederick. But the way CONSOL was designed,
14 you had a dotted-line supervisor, the senior -- the
15 Executive Vice President of Human Resources, who was Roger
16 Haynes. So I took my direct guidance from Mr. Frederick; I
17 took my dotted-line guidance and human resource issues from
18 Mr. Haynes.

19 **Q.** That is, your day-to-day supervisor on the ground was
20 Mr. Frederick, but your supervisor for purposes of human
21 resources, if I'm understanding -- I'm just trying to
22 clarify -- trying to clarify my understanding -- your
23 supervisor for purposes of human resources functions was
24 Roger Haynes?

25 **A.** Yes.

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1 Q. And his position was Executive Vice President for Human
2 Resources of CONSOL; is that right?

3 A. Yes.

4 Q. Who else did you work with who was senior to you in
5 CONSOL during this period that you've referenced?

6 A. Well, working for Mr. Haynes was -- CONSOL was designed
7 exactly the same from the top to the bottom. You had
8 Haynes, and he had direct reports on employee development,
9 employment, benefits. And the labor relations function was
10 not under him; it was separate, under a different person.
11 But it was designed identically the same from the top to the
12 bottom. So I worked with George Fedlow [phonetic], who was
13 manager of employee development. I worked with Chris
14 McMillan [phonetic], who was the manager of employment. I
15 worked with William Waddle [phonetic], who was the benefits
16 and compensation manager. They were the so-called experts
17 on those issues at the senior level.

18 Q. And did you have a counterpart at your level in other
19 regions of the country?

20 A. Yes.

21 Q. And do you remember the name of the counterpart that
22 you had as to the Bailey and Enlow Mines?

23 A. That was Bill Phillips was the -- my counterpart there.

24 Q. And what specific deliverables were you involved in
25 producing as to the union-free operations at Burnham,

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1 Buchanan, Eastern Kentucky, Bailey and Enlow?

2 MR. TORRES: Objection. The question is compound
3 as phrased because he testified these all happened at
4 different periods of time.

5 THE COURT: Break it down, if you will.

6 BY MR. PETSONK:

7 Q. When CONSOL opened the union-free operation at Burnham,
8 you were involved with the development of the strategy for
9 the opening of that operation; is that right?

10 A. I was involved with a senior manager in industrial
11 relations by the name of Ken Eyler [phonetic]. He developed
12 a handbook with input from all of the senior HR managers
13 across the company, because it was the first one.

14 Q. The first nonunion or union-free handbook that CONSOL
15 had produced; is that right?

16 A. Yes.

17 Q. What other deliverables did CONSOL develop, to your
18 knowledge, besides the handbook for the union -- for that
19 union-free operation in Burnham?

20 A. Well, they had an employee orientation. Not as
21 sophisticated as the one we developed for Buchanan and
22 Bailey and Enlow, but it was the first of the orientations.
23 Basically, it was a sales pitch.

24 MR. TORRES: I'm sorry, I didn't hear what the
25 witness said.

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1 BY MR. PETSONK:

2 Q. Please restate what you just said.

3 A. I said, basically, it was a sales pitch for the Navajo
4 Tribe at the Burnham operations in Four Corners; it was a
5 Navajo operation, so it was basically a sales pitch.

6 Q. And what was the sales pitch -- what was the sales
7 pitch at the union-free operation there that you developed?

8 A. The basic sales pitch was that you -- if you don't sign
9 a card, okay, this is the benefit package that we will
10 provide you, and this is our promise to you to provide this
11 package.

12 THE COURT: When you say, "If you don't sign a
13 card," to what are you referring?

14 THE WITNESS: A union card, so not to organize the
15 location.

16 THE COURT: And when you said a moment ago you
17 were involved with an individual, what did you mean by that?

18 THE WITNESS: Well, his primary responsibility was
19 developing a handbook with our input.

20 THE COURT: Please go ahead.

21 MR. TORRES: Your Honor, again, I think if this
22 was to establish foundation, he hasn't. He's just testified
23 some other individual developed the handbook. He can't
24 testify as to what that person did.

25 All he can say is, here's what I told that individual.

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1 Other than that, it's hearsay. And he lacks foundation as
2 to what that gentleman was thinking or doing.

3 THE COURT: Well, I don't think counsel's gotten
4 to that point yet. So let's see what the further
5 development is.

6 BY MR. PETSONK:

7 **Q.** Well, Mr. Hymes, you referenced the Buchanan location,
8 the second location. You testified that you provided input
9 to Mr. Ken Eyler regarding the development of an employee
10 handbook and new employee orientation materials at that
11 first Burnham union-free operation. I'd like to ask you
12 about what you specifically did in connection with the
13 development of the Buchanan operation.

14 And you referenced that you -- what deliverables did
15 you participate in developing for the Buchanan operation?

16 **A.** Buchanan operation was in my region and my primary
17 responsibility; therefore, the development of the handbook
18 and the development of the orientation was under my primary
19 responsibility to ensure that it was done and done properly
20 in accordance with the outline that I received from my
21 supervisor in Pittsburgh and from my direct supervisor in
22 Bluefield.

23 **Q.** And when you reference your supervisor in Pittsburgh,
24 you are referring to the Executive Vice President of Human
25 Resources, Roger Haynes?

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1 **A.** Yes.

2 **Q.** So your testimony is that you personally drafted and
3 developed the employee handbook and the new employee
4 orientation materials at Buchanan, because that was within
5 your region; is that right?

6 **A.** Me and the folks that worked directly for me.

7 **Q.** And that was all pursuant to the guidance you received
8 from Roger Haynes, right?

9 **A.** Pursuant to the guidance I received, it was basically,
10 here's the direction we are going, here's the strategy, and
11 here's what we want to do.

12 **Q.** In the development of the Buchanan union-free
13 operations, who else that you supervised -- who was
14 underneath you in your supervision structure did you work
15 with in developing those materials?

16 **A.** John Fox, Gene Bailey -- let's see who else -- John
17 Fox, Gene Bailey -- I'm trying to remember -- J. W. Jones,
18 who was my employee development manager. The other names
19 escapes me right now.

20 **Q.** What were the job classifications held by -- strike
21 that.

22 During what period -- what time period did you develop
23 these, the employee handbook and the new employee
24 orientation materials for the Buchanan operation?

25 **A.** Well, probably was -- I'm trying to remember -- in the

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1 early '80s, because it took a while to do it. We had not
2 done one before, so it was -- I think Buchanan opened in
3 '86, so it was somewhere in '82, '83, where we started with
4 development of it. And then before the mine opened, we had
5 a handbook and we had employee orientations.

6 **Q.** When did Buchanan Number One Mine first open?

7 **A.** I think '86, but I really can't remember.

8 **Q.** That's fine. What was the job classification of John
9 Fox during this period?

10 **A.** Mr. Fox originally was a manager of benefits and
11 compensation for me, but I asked him -- because the critical
12 piece of union avoidance is making sure the benefits operate
13 properly, on top of making sure you selected the right
14 person. So I asked him if he would become the supervisor of
15 industrial employee relations at Buchanan, and he agreed to
16 do it.

17 **Q.** And that was a position at the mine site interfacing
18 with coal miners about human resources and benefit matters
19 at Buchanan?

20 **A.** Yes.

21 **Q.** And what job classification did Gene Bailey hold when
22 you developed the union-free strategy operation for
23 Buchanan?

24 **A.** Well, he was originally the manager of employee of --
25 of employment. He was over the selection piece of

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1 employment. But then when Fox moved to the benefits, moved
2 to Buchanan, Gene moved into benefits and compensation.

3 MR. PETSONK: Your Honor, may I proceed with my
4 line of questioning as to other operations, or where do we
5 stand with reference to the foundation for Mr. Hymes'
6 knowledge of the development of the union-free strategy at
7 Buchanan?

8 THE COURT: I guess it will depend on the question
9 you ask.

10 MR. PETSONK: I didn't know if there was a
11 standing objection to line of questioning, Your Honor.

12 THE COURT: Well, there may be one by the time you
13 finish.

14 MR. PETSONK: Okay.

15 BY MR. PETSONK:

16 **Q.** With regard to the CONSOL operations in Eastern
17 Kentucky that you referenced earlier, what deliverables did
18 CONSOL call upon you to develop in connection with those
19 union-free operations?

20 **A.** Well, when we determined we were going to make the
21 purchase, it was my primary responsibility to go and assess
22 the human resources function at the location. It was --
23 their corporate area was in Lexington. I went and assessed
24 that. And then I went to the coal mines and assessed that
25 location to see what their wage and benefit package was and

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1 what it looked like. Bottom-line was, we had a wage and
2 benefits package designed for union-free operations. And
3 that's the one we implemented at the Eastern Kentucky
4 operations.

5 **Q.** Now, when you say, we had a benefit package for
6 union-free operations, you mean CONSOL?

7 **A.** I mean CONSOL, yes.

8 MR. TORRES: Well, then I'm going to object to
9 lack of foundation, Your Honor. He can't testify on behalf
10 of CONSOL. He can testify as to what he did. He's not --
11 he's a former employee of CONSOL. He can't purport to stand
12 up there and tell us absent some more specific foundation
13 what the corporation did on anything.

14 And he keeps lapsing into this, "We did this," and "We
15 did that."

16 He can't -- he has no basis for offering that sort of
17 testimony.

18 THE COURT: The witness can tell us what he did.

19 MR. PETSONK: Certainly. Thank you, Your Honor.

20 BY MR. PETSONK:

21 **Q.** After you developed the union-free strategy that you've
22 described here applied at the Buchanan operations, who held
23 custody of that, the deliverables that you produced in
24 connection with that strategy?

25 THE COURT: What do you mean by "deliverables"?

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1 Is that the handbook?

2 MR. PETSONK: The handbook and the new employee
3 orientation materials.

4 BY MR. PETSONK:

5 **Q.** Did your supervisors hold those materials or have
6 access to those?

7 **A.** Those materials were developed by CONSOL's corporate
8 Human Resources group in conjunction with the regional
9 managers of CONSOL, Eastern Region and me, all of those
10 regional managers, and the senior management of Human
11 Resources in CONSOL. It was a package. It was a designed
12 package.

13 THE COURT: One moment.

14 (Pause.)

15 THE COURT: Mr. Torres.

16 MR. TORRES: Your Honor, I am sorry to continue to
17 interrupt. But, again, he's -- the gentleman is not
18 qualified to be testifying as to CONSOL generally, which he
19 keeps doing. He can say: I did this. I said this. I
20 drafted this. I reviewed this.

21 But he cannot testify generally and broadly about
22 numerous individuals, unnamed individuals in the corporation
23 to say this is what CONSOL was doing.

24 THE COURT: What is your response to that?

25 MR. PETSONK: Your Honor, I am glad to develop

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1 further the testimony as to Mr. Hymes' particular
2 communications with others and with whom specifically he
3 communicated with about the development of the strategy at
4 the Buchanan Mine.

5 THE COURT: Mr. Torres.

6 MR. TORRES: Your Honor, again, this Court has
7 already made findings in this litigation regarding the
8 limits of Mr. Hymes' knowledge about matters that are
9 relevant to this lawsuit. And what we are hearing is like
10 some examination to try and qualify him as some sort of
11 witness -- expert witness or something, where he's
12 testifying generally about the mindset of the corporation or
13 what its strategy was, and he's just not in a position to do
14 that. That's hearsay.

15 He's not a representative of the company. He hasn't
16 been in this company since 1993. And so I'm not even sure
17 what the relevance of this is. Your Honor's already found
18 that to the extent he had any knowledge, it ended in 1993.
19 And the only plaintiff remaining in this lawsuit who was
20 around in 1993 was Mr. Casey.

21 So unless he's got some knowledge about what Mr. Casey
22 was told in this lawsuit, this sounds more like testimony
23 that we would be hearing if this was still a class action,
24 but it's not.

25 THE COURT: Anything further on the point, Mr.

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1 Petsonk?

2 MR. PETSONK: I do not seek to elicit testimony
3 regarding any of our allegations in the class pleadings,
4 certainly, Your Honor.

5 I'm simply seeking to elicit testimony as to who
6 directed Mr. Hymes in his work and who he dealt with in his
7 work, and what his work was during the time that he
8 developed the materials that we've referenced here. That's
9 the extent of my questioning.

10 MR. TORRES: Your Honor, we alluded to this
11 before. They've identified this gentleman in their
12 submissions as some sort of corroborating witness, that's
13 how they described him to you. He somehow has the ability
14 to speak to the corporate knowledge and intent, which we
15 don't think he can or should be allowed to do, any more than
16 the other corroborating witness.

17 So the fact that Mr. Petsonk currently is just asking
18 him what his job duties are, is just preliminary to him
19 trying to have this gentleman, as they've described it,
20 somehow speak to what -- what the corporation's intent was.
21 That's not relevant in this lawsuit anymore, Your Honor.

22 The question is, what did these seven individuals hear
23 from the people they specifically identified in their
24 testimony.

25 You haven't heard from Mr. Fitzwater, but none of these

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1 individuals identified Mr. Hymes as someone who made a
2 statement to them. And you heard them testify as to what
3 materials they specifically allegedly saw. And you've heard
4 them testify as to what specific documents they allegedly
5 received.

6 So I don't -- I don't think Mr. Hymes has any knowledge
7 that's relevant to what these individuals experienced, which
8 is the only remaining issue in this litigation.

9 And so the fact that he developed a handbook at
10 Buchanan, and the fact he might have developed a script at
11 Buchanan, again, maybe it's relevant to Mr. Casey, but I
12 don't remember Mr. Casey talking about some orientation
13 script. He testified that someone explained to him orally
14 that he was going to have benefits until he died. So I
15 suppose if he wants to try and offer testimony from this
16 gentleman specific to Mr. Casey, which is the only person
17 who was still around, then I suppose we can see what that
18 testimony is.

19 But given the amount of paper that Mr. Petsonk has
20 before him, I don't think that's really the intent here and
21 given how they describe what they think this gentleman is
22 allegedly capable of testifying to.

23 I think they are trying to offer him as to sort of
24 testify as to what the corporate intent was, that is not
25 even relevant, and he's not otherwise qualified to do that.

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1 MR. PETSONK: Your Honor, I agree that the
2 corporate intent or anybody's intent is not relevant. But
3 what is relevant, in my understanding, Your Honor, to the
4 question as to which you allowed us to try this case, and
5 that is, the question of whether the apparent agents of
6 CONSOL's fiduciary in the retiree welfare benefit plan
7 breached the fiduciary duty by making misrepresentations to
8 our plaintiffs.

9 And so my understanding, and what I seek to elicit
10 here, is factual testimony as to -- that pertains to
11 fiduciary actions, because it is a question as to whether
12 fiduciary actions were involved and whether the people
13 involved in the delivery of the representations that are at
14 issue for our plaintiffs were apparent agencies of the
15 alleged fiduciaries as to these alleged misrepresentations.

16 So I seek his testimony simply about the relevant
17 fiduciary acts. And that's -- that's the scope of my
18 testimony. And I'm inquiring about which actions were
19 conducted as far as production of these slideshows in the
20 orientation sessions that we heard a lot about in this case.
21 And it bears on the question whether those were fiduciary
22 actions or whether the statements made during the course of
23 those orientations were conveyed by apparent agents of the
24 fiduciary of this company.

25 MR. TORRES: How does this gentleman testify about

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1 presentations he didn't participate in? There's been no
2 testimony he was present for any presentation by any of
3 these gentlemen who were named by any of the witnesses who
4 have testified so far.

5 So if Mr. Petsonk is now conceding that corporate
6 intent is not relevant, Your Honor, then unless this
7 gentleman can testify that he was physically present when
8 one of the alleged statements was made to these plaintiffs,
9 which are the only remaining claims in this lawsuit, then he
10 has absolutely no relevant testimony to the issues before
11 this Court.

12 THE COURT: Mr. Petsonk, if Mr. Hymes has
13 instructed those who have been referred to in the case as
14 being employee handbooks or conducting a series of meetings
15 which occurred after orientation, then he's at liberty as to
16 what on the one hand he was instructed to design as a course
17 of action, and by whom; and secondly, to whom those
18 instructions were given.

19 Now then, ultimately, one has to relate what he says he
20 was instructed to do to the fiduciary. And if you can make
21 that line, you can inquire of the witness, if he knows.

22 You may proceed.

23 MR. PETSONK: Thank you, Your Honor.

24 BY MR. PETSONK:

25 Q. Mr. Hymes, what were you instructed to design as to the

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1 union-free strategy at the Buchanan mine?

2 THE COURT: The question initially is, by whom?

3 BY MR. PETSONK:

4 Q. Well, I can certainly ask. Who instructed you to
5 design the union-free strategy for CONSOL at the Buchanan
6 mine?

7 MR. TORRES: Same objection, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: Roger Haynes.

10 BY MR. PETSONK:

11 Q. And at the time he instructed you to do that, he was
12 the Executive Vice President of Human Resources; is that
13 correct?

14 A. Yes.

15 Q. For CONSOL; is that correct?

16 A. Yes.

17 Q. And what did Roger Haynes instruct you to design within
18 the union-free strategy for the Buchanan operations?

19 A. A package that would be equal to or better than the
20 UMWA package.

21 Q. And who did you instruct to deliver that strategy at
22 the mine level, at the Buchanan operation?

23 A. John Fox was the -- my functional report at the
24 Buchanan operation. And assisting him would have been
25 Gerald Nicholson, who was the trainer for our region, who

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1 basically managed the orientation for us. And my regional
2 manager of employee development, J. W. Jones, who was
3 overall responsible for the employee orientations and all
4 our employee training.

5 **Q.** And when you referenced that Gerald Nicholson was the
6 trainer for your region, what's the geographic region that
7 you reference there?

8 **A.** The Tennessee, the Eastern Kentucky, Southwest
9 Virginia, and Southern West Virginia.

10 **Q.** When you say Southern West Virginia --

11 **A.** Beckley, south.

12 **Q.** Okay. That includes all of the mines within the CONSOL
13 of Kentucky operating units; is that right?

14 **A.** Yes.

15 MR. PETSONK: Now, may I proceed to inquire about
16 the Eastern Kentucky region and what knowledge Mr. Hymes has
17 about that region?

18 THE COURT: Before you do that, what area was
19 covered by CONSOL of Kentucky? Where were those operating
20 mines located?

21 THE WITNESS: They were in Pike County, Johnson
22 County, Knott County, and Letcher County.

23 THE COURT: You said, Pike, Johnson, and what
24 else?

25 THE WITNESS: Pike, Johnson, Knott, K-N-O-T-T.

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1 Knott. And Letcher County.

2 THE COURT: And the last one was, what?

3 THE WITNESS: L-E-T-C-H-E-R, Letcher County.

4 THE COURT: All in Kentucky?

5 THE WITNESS: Yes, sir.

6 THE COURT: And you said Beckley, south?

7 THE WITNESS: Yes, sir.

8 THE COURT: And then you equated that with the
9 Southern District of West Virginia?

10 THE WITNESS: It would have been Raleigh County,
11 Mercer, McDowell, Wyoming, and Mingo.

12 THE COURT: And that's referred to alternatively
13 as southern, the Southern District of West Virginia for
14 CONSOL purposes?

15 THE WITNESS: It would have been called Southern
16 Appalachian Region, yes, sir.

17 THE COURT: Well, I had Southern Appalachian
18 Region was broader than that.

19 THE WITNESS: Yes, sir. I misspoke. Yes,
20 that's -- the West Virginia part of that Southern
21 Appalachian.

22 THE COURT: The Southern District of West
23 Virginia, those counties you just last referred to?

24 THE WITNESS: Yes, sir.

25 THE COURT: Thank you. Please go ahead.

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1 BY MR. PETSONK:

2 Q. Now, Mr. Hymes, the Court has inquired about which
3 counties were operating within the -- your region of CONSOL,
4 and I want to be clear as to whether CONSOL continued to
5 make acquisitions of additional mining properties throughout
6 the time you worked for them throughout that region?

7 THE COURT: Within which region?

8 MR. PETSONK: The region that was known as the
9 eastern -- or the, rather, the Southern Appalachian Region.

10 THE WITNESS: The last acquisition that was made
11 while I was there was the Eastern Kentucky operations.

12 BY MR. PETSONK:

13 Q. Did any of those operations --

14 THE COURT: How do you distinguish between CONSOL
15 of Kentucky and Eastern Kentucky?

16 THE WITNESS: Well, initially, it was called
17 Eastern Kentucky operations. And then they changed it to
18 CONSOL of Kentucky.

19 THE COURT: So it's the same thing?

20 THE WITNESS: Yes, sir.

21 THE COURT: Go ahead.

22 BY MR. PETSONK:

23 Q. Who instructed you to design the union-free strategy
24 for the Eastern Kentucky or CONSOL of Kentucky operations as
25 you've described here?

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1 **A.** It would have been Roger Haynes.

2 **Q.** And what did Roger Haynes instruct you to design and to
3 deliver with regard to the union-free strategy at the CONSOL
4 of Kentucky operations?

5 THE COURT: You've already stated that.

6 MR. TORRES: Well, Your Honor --

7 THE COURT: Just a moment. Didn't the witness
8 already answer that question?

9 MR. PETSONK: I think some of his answer was
10 subject to an objection, so I wanted to restate the
11 question, Your Honor, to lay an adequate foundation, a
12 clearer foundation.

13 THE COURT: There may be an objection anyway, so
14 let's hear it from Mr. Torres.

15 MR. TORRES: Your Honor, the question lacks
16 foundation, because the gentleman already testified that,
17 while he was at CONSOL, the only thing at Eastern Kentucky
18 was -- in Davis, Kentucky, at that point in time. And then
19 they had bought some undeveloped land which later on become
20 Jones Fork, which is where Mr. Prater worked. So he has no
21 foundation as to what eventually became CONSOL of Kentucky.

22 His knowledge is limited to this single site in Davis
23 County which is what he testified to previously was
24 purchased by CONSOL while he was there. So they are
25 mixing -- Eastern Kentucky is not the same as CONSOL of

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1 Kentucky as it relates to Mr. Prater, because the mine he
2 was working at didn't even exist when this gentleman was
3 doing whatever he was doing regarding the Eastern Kentucky
4 operations.

5 THE COURT: Well, is it the case that this
6 witness' knowledge then as of 1993 when he left, was limited
7 to Davis?

8 MR. PETSONK: Well, Your Honor, I think I can
9 clarify this if I may make one further question of Mr.
10 Hymes.

11 THE COURT: Do so.

12 BY MR. PETSONK:

13 **Q.** Mr. Hymes, who did you hire or instruct to implement
14 the union-free operations or the union-free strategy at the
15 CONSOL of Kentucky operations?

16 **A.** Well, when we acquired that from Utah International --

17 THE COURT: And if I can interrupt.

18 When would that have been?

19 THE WITNESS: Oh, gosh, Your Honor.

20 THE COURT: About when?

21 THE WITNESS: Probably '89, maybe.

22 THE COURT: Thank you.

23 THE WITNESS: We acquired that and -- Craig
24 Campbell was the mine site HR person for Utah International.
25 Okay. CONSOL's philosophy was, we put our own guys in. So

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1 we moved Roger Cutright there and moved Craig Campbell to
2 Bluefield to work for me. He replaced Gene Bailey.

3 BY MR. PETSONK:

4 **Q.** Was there --

5 **A.** I'm sorry. Let me finish. The Utah International
6 acquisition included the property which would later be
7 called Jones Fork and property in Mingo County, West
8 Virginia, which I don't remember what CONSOL named it. But
9 you had the David, Kentucky, property, which was operating
10 with two surface mines and a preparation plant, and then you
11 had the Jones Fork property, which later became Jones Fork
12 mine, and then the mines in Mingo County.

13 **Q.** What role did Craig Campbell have in implementing the
14 union-free strategy under your supervision at the CONSOL of
15 Kentucky operation?

16 MR. TORRES: Objection, Your Honor. Again, the
17 gentleman just testified Mr. Campbell came and worked for
18 him and that they sent someone else to this Kentucky region.
19 So even if Mr. Prater testified that Mr. Campbell allegedly
20 made him a promise, according to this gentleman's testimony,
21 Mr. Campbell came to work for him when he sent Mr. Bailey to
22 work for CONSOL -- work at the Eastern Kentucky operation.

23 But in any event, even if Mr. Campbell was working in
24 Kentucky, the issue is whether this gentleman can testify as
25 to what Mr. Campbell said to Mr. Prater when they had this

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1 orientation years after this gentleman left.

2 He's -- Mr. Petsonk is asking these very generic
3 questions without any specific time periods. It's not as if
4 every one of these plaintiffs was at CONSOL for the same
5 period of time. They were there at all different points of
6 time. And Your Honor noted in your Summary Judgment, the
7 only plaintiff who was around when this gentleman was
8 working at CONSOL was Mr. Casey. So whatever he said to Mr.
9 Campbell in the '90s, quite frankly, I don't know what that
10 does to prove up Mr. Prater's claim as to what Campbell said
11 to him seven, eight, nine years later. That's the issue in
12 the lawsuit. It's not what him and Mr. Campbell talked
13 about eight years earlier about union-free operations.

14 THE COURT: Thank you.

15 Mr. Petsonk, what the Court wants you to do is to trace
16 this, and part of the tracing is timing, when this or that
17 occurred. And so I'm going to ask you to start anew with
18 that, and let us know what happened, when and where.

19 Now, it may be that an individual such as Mr. Campbell
20 was instructed to follow this course or that which the
21 witness is saying he was instructed in turn to do with Mr.
22 Campbell, for example, being expected to carry it out. But
23 the necessity here is to isolate on these separate events
24 and take them one at a time so they can be examined.

25 And so I'm going to ask you to start anew on that. And

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1 you can begin with Buchanan, if you wish.

2 MR. PETSONK: Begin with Buchanan?

3 THE COURT: I say you can begin with that if you
4 wish.

5 BY MR. PETSONK:

6 Q. Mr. Hymes, do you recollect the date that the Buchanan
7 mine first opened? And it doesn't need to be exact. A
8 date?

9 A. In my mind, it would be 1986, but we worked on the
10 package before that.

11 Q. When you said you worked on the package, are you
12 referring to a union-free strategy?

13 A. What I'm referring to is the wage and benefits package
14 and the orientation that was developed as CONSOL's
15 union-free orientation and handbook.

16 Q. During what period do you recollect developing the
17 union-free strategy for application at the Buchanan Number
18 One Mine?

19 A. From probably '82 to '86, it would be my recollection.
20 It took a while for us to do that.

21 Q. Who instructed you to develop that union-free strategy
22 for the Buchanan Mine during the period from 1982 until the
23 opening of the mine in 1986?

24 A. Roger Haynes.

25 Q. And during that period, Roger Haynes -- I should say,

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1 throughout that period, as you recall, did Roger Haynes
2 serve in the capacity of Executive Vice President of Human
3 Resources for CONSOL?

4 **A.** Yes.

5 **Q.** And what deliverables did Mr. Haynes instruct you to
6 design in that union-free strategy for Buchanan during that
7 period of development that you referenced from 1982 to 1986?

8 **A.** The new employee union-free orientation and the
9 employee handbook.

10 **Q.** Did you, in fact, develop a new employee handbook and a
11 new employee orientation during that period?

12 **A.** I did, with those folks who reported to me.

13 **Q.** Did you consult with Mr. Haynes during the development
14 of those materials?

15 **A.** There were many trips to Pittsburgh and many phone
16 calls, yes.

17 **Q.** And you also worked with your subordinates in the Human
18 Resources Division during that period as you developed the
19 union-free handbook and orientation for Buchanan, correct?

20 **A.** Yes.

21 **Q.** And once the Buchanan Mine opened, who did you instruct
22 to carry out the union-free strategy at the Buchanan Mine?

23 **A.** Mr. Fox -- Mr. Nicholson managed that orientation. Mr.
24 Fox was on the ground at Buchanan as the primary employee
25 contact.

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1 **Q.** To clarify, what job classification did Mr. Fox hold
2 while he carried out the union-free strategy at the Buchanan
3 Mine?

4 **A.** The mine -- the job title was Supervisor of Industrial
5 Employee Relations.

6 **Q.** And that was in your Human Resources Department that
7 you supervised, correct?

8 **A.** Yes. He was a dotted-line report to me, and a solid
9 line report to his mine manager.

10 **Q.** So he reported to you for purposes of HR policy; is
11 that right?

12 **A.** Yes.

13 **Q.** And he reported to the mine manager for purposes of
14 day-to-day mine operations; is that right?

15 **A.** Yes.

16 **Q.** And, Mr. Bailey, what job classification did he hold
17 during that period when he carried out the union-free
18 strategy, starting in 1986 -- or around 1986, at the
19 Buchanan Mine?

20 **A.** He originally was manager of employee -- employment,
21 and then when Mr. Fox moved, he became manager of the
22 employee benefits and compensation.

23 **Q.** And that was a Human Resources function subordinate to
24 you in the Human Resources Department at CONSOL during that
25 period after '86 when they opened the mine and carried out

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1 the union-free strategy at the Buchanan operations, right?

2 **A.** He was a direct report to me, yes.

3 MR. PETSONK: Your Honor, I would like to inquire
4 about the contents of those employee orientations, but
5 should I move forward and lay a similar foundation as to the
6 CONSOL of Kentucky operations at this time?

7 THE COURT: I believe it would be well to do that.
8 I understand, in 1989 the Utah International operation was
9 obtained, and I'd like for the witness to go back and define
10 what that was in 1989 down to the time that he left in 1993.
11 BY MR. PETSONK:

12 **Q.** Mr. Hymes, you testified that CONSOL acquired the
13 Eastern Kentucky operations of Utah International in 1989;
14 is that right?

15 **A.** That's the best of my knowledge.

16 **Q.** And you testified that those operations that CONSOL
17 acquired from Utah International around '89 included a part
18 you called the Jones Fork operations; is that right?

19 **A.** That was part of that acquisition, yes.

20 **Q.** And who instructed you to develop a union-free strategy
21 for that Jones Fork and other CONSOL of Kentucky operations?

22 THE COURT: I don't want you to just leave it
23 "other." I want to know what they are. Jones Fork is one.
24 If there is more than that, let's find out what they were
25 and, more particularly, do they have any relationship to

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1 this case.

2 MR. PETSONK: Well, Your Honor, I would -- I can
3 ask him about that.

4 BY MR. PETSONK:

5 Q. What other --

6 MR. PETSONK: But I am not sure the other
7 operations have relationship to the case, Your Honor, so in
8 interest of not belaboring the record, he has testified, I
9 believe, it did include the Jones Fork operations at that
10 time.

11 THE COURT: Is that the only one relevant here?

12 MR. PETSONK: It is the only one relevant that he
13 has testified was included within the CONSOL of Kentucky
14 acquisition around 1989.

15 MR. TORRES: Your Honor, if I may, as it relates
16 to this foundation issue? What he testified to before was
17 that this acquisition he's testifying to involved --
18 included undeveloped land, which later became the Jones Fork
19 operation. So the implication of the most recent question
20 is somehow that this was an up-and-running operation, and
21 that's just not accurate, during this period that we are
22 talking about.

23 THE COURT: And so the focus became, at any rate,
24 some time between 1989 and 1993 on Jones Fork? Correct?

25 MR. PETSONK: Correct.

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1 THE COURT: And that's part of CONSOL?

2 MR. PETSONK: CONSOL of Kentucky.

3 THE COURT: And anything else to be developed
4 beyond Jones Fork? I'm talking about through this witness'
5 testimony?

6 MR. PETSONK: No, Your Honor. What I seek to
7 develop is who was involved in the development of the
8 union-free strategy as to that operation at that time, 1989
9 to 1993, which reference to which Mr. Hymes has direct
10 knowledge.

11 THE COURT: You may proceed.

12 BY MR. PETSONK:

13 Q. Mr. Hymes, who instructed you to develop a union-free
14 strategy for the CONSOL of Kentucky operation that you
15 described as having been acquired by --

16 THE COURT: You're getting away from me now.

17 I want to know specifically what you're talking about.
18 If it's Jones Fork, and if that is all there is to it, then
19 refer to it as Jones Fork.

20 BY MR. PETSONK:

21 Q. Okay. Who instructed you to develop the union-free
22 strategy to be applied at the Jones Fork operations within
23 CONSOL of Kentucky that were acquired by CONSOL -- the
24 property for which was acquired by CONSOL around 1989, Mr.
25 Hymes?

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1 **A.** We had a union-free package in our existing Eastern
2 Kentucky operations. That was a surface mine preparation
3 plan package. With Jones Fork startup, we had to develop a
4 deep mine package for the Jones Fork operation. I argued
5 with the folks, Mr. Haynes in Pittsburgh, and Mr. Hyler,
6 Buck Hyler, who was the labor relations manager, that we
7 need not do an identical package to Bailey and Buchanan,
8 because the market didn't require it. And I was instructed
9 to use the Bailey-Buchanan deep mine package for Jones Fork.

10 So Craig Campbell went to Jones Fork from Bluefield to
11 be the HR manager at Jones Fork with that instruction.

12 **Q.** And who gave that instruction to you to use the
13 Bailey-Enlow union-free strategy at the Jones Fork operation
14 in Kentucky?

15 **A.** Haynes and Hyler gave me direct orders. It was two
16 dollars to three dollars more than necessary to get a good
17 workforce.

18 **Q.** But you took Mr. Hyler's instructions --

19 THE COURT: One moment. We started with Buchanan.
20 And we are ending up now with Bailey and Enlow. The initial
21 strategy was designed for Buchanan, correct?

22 THE WITNESS: The initial strategy was done for
23 Buchanan as a union-free strategy, yes, sir.

24 THE COURT: And that's what was then sought to be
25 applied to Jones Fork?

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1 THE WITNESS: Yes, sir.

2 THE COURT: And then what did Bailey and Enlow
3 have to do with that? Did they come on in between those
4 times?

5 THE WITNESS: Bailey and Enlow came on in between
6 those times and the packages were identical.

7 THE COURT: To, once again, Buchanan? What do you
8 call it Buchanan or Buchanan?

9 THE WITNESS: Buchanan, yes, sir.

10 THE COURT: Thank you. Please go ahead.

11 BY MR. PETSONK:

12 **Q.** Did the handbooks and training materials that Mr. Hyler
13 and Mr. Haynes instructed you to develop and implement at
14 the Buchanan and the CONSOL of Kentucky operations have a
15 common design?

16 **A.** They were basically all the same as far as what they
17 looked like. The covers were different. The first page was
18 signed by whoever the mine superintendent was. But when you
19 got into the nuts and bolts, they looked identical.

20 **Q.** And Mr. Hyler instructed you to use the Bailey and
21 Enlow wage rate; is that your testimony, at the CONSOL of
22 Kentucky operations, when you opened those operations in
23 around '89? Is that your testimony?

24 **A.** The Eastern Kentucky operations at David were a surface
25 mine, so we used the same strategy to develop the surface

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1 mine and preparation plant rates that we used for Bailey,
2 Enlow and Buchanan, that was basically taking the mine
3 worker rate and adding on to it for those things that we
4 didn't give employees that was in the mine worker contract.

5 **Q.** You're using the language of "we" again. When you
6 referred to "We," -- were you involved in the development of
7 the union-free strategy and the materials that supported
8 that strategy as applied to the Bailey and Enlow Mines in
9 Pennsylvania?

10 **A.** I use we, because we -- I did Buchanan, I did Eastern
11 Kentucky, and I did Jones Fork. They were identical to
12 Bailey and Enlow.

13 **Q.** How do you know that they were identical to Bailey and
14 Enlow?

15 **A.** Because the strategy was designed to be the same across
16 the company.

17 **Q.** Who designed the union-free strategy to be used the
18 same across the company as you have described?

19 **A.** Mr. Haynes, at the direction of Bobby Brown, our -- the
20 CEO of the company.

21 **Q.** What company was Mr. Brown the CEO of during the period
22 that you described before, from 1982 to 1986, when this
23 union-free strategy was developed for the Buchanan
24 operation?

25 **A.** It was Consolidation Coal Company. It wasn't CONSOL

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1 Energy. It was Consolidation Coal Company.

2 **Q.** And who was the CEO during that period?

3 **A.** Mr. Brown.

4 **Q.** And during that period, what was Mr. Hyler's job
5 classification for the entity you've just referenced as
6 CONSOL?

7 **A.** I think his job title was Senior Vice President of
8 Labor Relations. That function did not report to Mr.
9 Haynes; it was separate. And part of that was a
10 double-breasting strategy.

11 THE COURT: Let me ask you, before you go on.

12 Can the parties agree on what the scope of
13 Consolidation Coal Company was in the 1980s to 1993 period?
14 How did that differ from CONSOL Energy?

15 MR. TORRES: Well, it differs, because CONSOL --
16 Consolidated Coal was actually owned by DuPont at that time,
17 Your Honor -- or Conoco -- DuPont. And so it was -- CONSOL
18 Energy became CONSOL Energy when it engaged in an IPO, I
19 believe, in the '90s. So CONSOL as sort of the corporate
20 parent of these other entities doesn't come into existence
21 until the '90s.

22 THE COURT: And when in the '90s? Was it sometime
23 after 1993?

24 MR. TORRES: No, I believe it was -- it was
25 somewhere in that time period. I can get the specifics if

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1 you give me one second, Your Honor.

2 THE COURT: All right. I want you to tell me
3 again about, when CONSOL Energy came into being, what did it
4 represent; what did it include?

5 MR. PETSONK: Your Honor, the witness may have
6 knowledge --

7 THE COURT: Let Mr. Torres --

8 MR. TORRES: One second, Your Honor.

9 CONSOL Energy would have become CONSOL Energy, Your
10 Honor, in 1991. At that point, it didn't own AMVEST-Fola,
11 because that acquisition didn't occur until 2007.

12 THE COURT: Is AMVEST and Fola the same thing?

13 MR. TORRES: No, Fola Mine was part AMVEST, which
14 CONSOL purchased in 2007. And the two plaintiffs in this
15 case, Mr. Bright and Mr. Fitzwater, worked at the Fola mine
16 which was part AMVEST.

17 THE COURT: So AMVEST, in effect, sold Fola to
18 CONSOL?

19 MR. TORRES: Well, CONSOL purchased all of AMVEST,
20 including Fola, Your Honor.

21 THE COURT: Excuse me. Please go ahead.

22 MR. TORRES: And I can get you the specific dates
23 when CONSOL of Kentucky and CONSOL of Pennsylvania came into
24 existence, Your Honor. When CONSOL Energy -- just to
25 continue the thought -- Consolidation Coal was a subsidiary

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1 of CONSOL Energy going forward until Consolidation Coal was
2 sold to Murray Energy in 2014.

3 THE COURT: But prior to the Murray Energy
4 acquisition, CONSOL was the parent. And did it acquire
5 Consolidation?

6 MR. TORRES: No. I think there was a portion of
7 what used to be known of Consolidation Coal -- they sort of
8 renamed themselves. It used to be known as Consolidation
9 Coal. But when they spun it out as a separate company,
10 Consolidation Coal became CONSOL Energy, but some of the
11 assets of Consolidation Coal stayed under CONSOL. They
12 continued to refer to them as Consolidation Coal. So those
13 are certain mines, including Buchanan, Your Honor, that fell
14 under Consolidation Coal separate from the corporate entity
15 that we refer to as CONSOL of Kentucky and separate from
16 CONSOL of Pennsylvania.

17 And if it's helpful, Your Honor, I can give the
18 Court -- offer the Court a very specific timeline and
19 diagram so you can see where those entities fell, and at
20 what period of time.

21 THE COURT: I think that would be helpful.

22 MR. TORRES: Okay. We can do that, Your Honor.
23 No problem.

24 THE COURT: Please go ahead.
25

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1 BY MR. PETSONK:

2 Q. Mr. Hymes, in light of this exchange, do you know
3 whether the Buchanan operation came under the control of
4 CONSOL Energy, once CONSOL Energy was created?

5 MR. TORRES: Well, I object. It calls for a legal
6 conclusion.

7 MR. PETSONK: From an operational standpoint, Your
8 Honor. I'm just asking what knowledge he has.

9 MR. TORRES: Well, this gentleman wasn't there in
10 2001 when that happened, so he wouldn't have any knowledge
11 of that. He left in '93.

12 THE COURT: It seems to me the matter you are
13 referring to could be handled by matter of stipulation
14 instead of through this witness.

15 MR. PETSONK: Thank you, Your Honor.

16 Shall I continue with my questioning of Mr. Hymes?

17 THE COURT: Go ahead.

18 BY MR. PETSONK:

19 Q. Is it your testimony that you worked with your
20 superiors Hyler and Roger Haynes, as well as your
21 subordinates you've named during this period from 1982 to
22 1986, to develop the union-free strategy at Buchanan; is
23 that right?

24 A. Yes.

25 Q. And is it your testimony that CONSOL acquired what

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1 became known as CONSOL of Kentucky operations, specifically
2 relevant here, including the Jones Fork property, around
3 1989, right?

4 **A.** That's the best of my memory.

5 **Q.** You've also referenced your knowledge of the Bailey and
6 Enlow operations in Pennsylvania.

7 **A.** Yes.

8 **Q.** My question is: Were you involved in the development
9 of the union-free strategy as to those operations; and, if
10 so, when did that development occur?

11 **A.** The union-free strategy for Bailey, Enlow and Buchanan
12 and Jones Fork and Eastern Kentucky were all the same. It
13 was one corporate strategy as to how we approached union
14 avoidance -- how the company approached it.

15 MR. TORRES: Your Honor, I move to strike as
16 nonresponsive. He's again trying to testify on behalf of
17 CONSOL.

18 THE COURT: The objection is overruled.

19 You may continue.

20 BY MR. PETSONK:

21 **Q.** Regarding the orientation at the Buchanan Mine, when
22 during the course of the hiring process did CONSOL present
23 the orientation to new hires or job applicants, as it may
24 have been?

25 **A.** After the post-offer physical and the offer is made,

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1 the employees were brought to our regional office in
2 Bluefield; given a five-day orientation with the employees,
3 and a half a day employee and spouse orientation on Saturday
4 morning.

5 **Q.** So it was offered before the individual who had
6 received a job offer were expected to make a decision about
7 whether to accept or reject that offer?

8 **A.** No. It was post-offer.

9 **Q.** Right.

10 **A.** It was after they had received the offer and accepted
11 the offer, then they were placed in orientation before they
12 went to the coal mine.

13 **Q.** Let me clarify that sequence. Before they went to work
14 at the mine; is that right?

15 **A.** They were on the payroll, they received pay for being
16 in the orientation. They received time-and-a-half for
17 working half-day Saturday. Then they went to the mines to
18 perform, to see -- to perform their work.

19 **Q.** During the union-free orientation program, how many
20 days did CONSOL call the employees to participate in the
21 orientation at Buchanan, beginning when that mine opened in
22 1986?

23 **A.** It was a five-and-a-half-day program; 8 hours each day,
24 Monday through Friday with the employee, and then a half a
25 day Saturday with the employee and their spouse where we

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1 went over their benefits.

2 Q. Did the length of the program change over time at all,
3 to your knowledge?

4 A. Not while I was there.

5 Q. Did the design of the program that you've referenced
6 earlier change at all during the time that you were there?

7 A. Not while I was there.

8 Q. What specific components did you develop for the
9 Buchanan and union-free orientation program; that is, you
10 developed an orientation program, but what materials did you
11 develop as a part of the program?

12 A. There was an actual script which was written for the
13 presenter. Myself and my employee development manager, Mr.
14 Jones -- Mr. Fox was involved with that. Mr. Nicholson was
15 involved with that. It was reviewed and finally approved by
16 Mr. Haynes; my Senior Vice President, Eustace Frederick
17 approved it; and the Operating Vice President, Ron Smith,
18 who had ultimate operating responsibilities for Buchanan,
19 approved that. There was also input by George Fedlow, who
20 was the manager of employee development corporately, and
21 Bill Waddle, who was the manager of employee compensation
22 for CONSOL. The whole package had to be signed off on. And
23 the reason that the orientation was scripted was to make
24 sure that the message was consistent.

25 MR. TORRES: Objection; move to strike the last

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1 portion of his testimony. Lack of foundation, Your Honor.

2 THE COURT: Well, the last portion, I take it, has
3 to do with the message?

4 MR. TORRES: Yes, Your Honor.

5 THE COURT: And so I'm going to strike that
6 portion of the answer at the end.

7 And you can start again and lay a foundation for it.

8 BY MR. PETSONK:

9 Q. Who signed off on the -- when you say someone had to
10 sign off on the entire orientation materials before you
11 implemented them at a mine level, who are you referencing
12 who had to sign off on those materials before you used them
13 to train or orient the new miners?

14 A. The Senior Vice President of Operations, my direct
15 boss, and my functional boss, Roger Haynes, had to finally
16 sign off on the script.

17 Q. Did Roger Haynes provide you with materials for you to
18 consult and utilize in developing the script?

19 A. Roger Haynes expected me in working with George Fedlow,
20 his manager of employee development, and my people to
21 develop the script. He would sign off on it. But we had
22 many phone calls about how we wanted to communicate.

23 Q. Okay.

24 MR. PETSONK: May I approach the witness, Your
25 Honor?

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1 THE COURT: You may.

2 BY MR. PETSONK:

3 Q. Mr. Hymes, I've given you a document that's been
4 labeled Plaintiff's Exhibit 10. Please take a look at this
5 document. And I would note the very last page of the
6 document is upside down. But the document begins with
7 MSJ -- Bates Number 322, and it ends with the Bates Number
8 MSJ 462.

9 Mr. Hymes, is this document familiar to you?

10 A. Yes.

11 Q. And what does it say on page 1?

12 A. It says, "Enlow Fork" on the front page.

13 Q. And what does it say on the side there? There is a
14 little tab that is sticking out?

15 A. "Introduction Supervisor IER," which is industrial
16 employee relations. That's the mine site supervisor.

17 Q. And if you flip the document over, is there also a
18 caption on the last page or a title?

19 A. It says, one day conclusion on the last page.

20 Q. It says, "Day one conclusion"?

21 A. "Day one conclusion," yeah. Mm-hmm.

22 Q. What is this document, to your knowledge, Mr. Hymes?

23 A. This is the script I was referring to.

24 MR. TORRES: Your Honor.

25 THE COURT: Just a moment. Go ahead.

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1 MR. TORRES: I'd like the opportunity to voir dire
2 this witness on his testimony regarding this document,
3 because he's been referring to activities at your
4 instruction, Your Honor, that he was supposedly taking in
5 connection with the Buchanan Mine. And now he's been handed
6 a document that relates to Enlow Fork. And he is saying,
7 well, this is the script I was just talking about, but his
8 testimony for the last half hour related to Buchanan.

9 So if Mr. Petsonk is going to try and pretend like this
10 document applies at Buchanan, I'd like the opportunity to
11 voir dire the witness before we get into testimony that
12 doesn't appear to relate to the topic we're actually
13 discussing.

14 THE COURT: Very good. Do you need to develop
15 anything further on the point before Mr. Torres voir dieres?

16 MR. PETSONK: If I may?

17 THE COURT: Go ahead.

18 MR. PETSONK: Just briefly.

19 BY MR. PETSONK:

20 **Q.** Mr. Hymes, is this a document that you consulted in
21 developing or managing the union-free strategy at the
22 Buchanan operation?

23 **A.** This is the script for Enlow. Okay. Enlow was after
24 Bailey and Buchanan. Buchanan was the first script. We
25 used the same script everywhere. I don't have the Buchanan

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1 script. Okay. But it's my testimony that this script is
2 essentially identical to Buchanan. Only difference is it
3 plugs in Enlow Fork.

4 **Q.** And my question is, whether you consulted this document
5 as you -- as you managed the union-free strategy at the
6 Buchanan Mine?

7 **MR. TORRES:** Objection. Your Honor, he just said
8 that this document existed afterwards. So -- object to the
9 form of the question.

10 **MR. PETSONK:** Your Honor, if I may?

11 **BY MR. PETSONK:**

12 **Q.** You know, you managed the union-free strategy at the
13 Buchanan Mine after it opened in 1986; is that correct?

14 **A.** Yes.

15 **Q.** And you continued to have that job function until you
16 left CONSOL in 1993, correct?

17 **A.** Yes.

18 **Q.** And is this a document you utilized in the management
19 of the union-free strategy during that period from 1986 to
20 1993, while the Buchanan Mine was operating, and you managed
21 the union-free strategy as to that mine?

22 **A.** This is the Enlow Fork document. It's not the Buchanan
23 document. But it's identical.

24 **Q.** And did you -- did you have possession of this document
25 during that period?

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1 MR. TORRES: Object to the form of the question.

2 THE COURT: The objection is overruled. Go ahead.

3 THE WITNESS: I'm sure I did. What would happen
4 is, the Buchanan documents were given to Bill Phillips, my
5 counterpart in the Eastern Region. The Bailey documents
6 were given to me. We all had a set of documents. The only
7 difference was when you plugged in different names. It was
8 one strategy.

9 MR. PETSONK: May I inquire further about this
10 document or move for its -- with the intention of moving for
11 its admission, Your Honor?

12 THE COURT: If you've finished this preliminary
13 part, Mr. Torres will voir dire the witness.

14 MR. PETSONK: Yes, I have.

15 THE COURT: One thing I want to ask you, when you
16 say, "plug in," are you suggesting that the only difference
17 between this document and the script that was used for
18 Buchanan was that the names were changed? Is that what you
19 are saying?

20 THE WITNESS: Essentially.

21 THE COURT: You said, "Essentially." I want to
22 know what the differences are.

23 And is there any difference other than that, that the
24 name "Buchanan" is out and the name "Enlow Fork Mine" is in?
25 Are there any other differences?

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1 THE WITNESS: Because of the timing, Buchanan
2 being first, Bailey being second, Enlow being third, I'm
3 sure there are some slight differences in maybe the benefits
4 or something like that, because of the timing of when this
5 discussion about when CONSOL Energy become Consolidation
6 Coal. So I can't tell you they are absolutely identical,
7 but they were designed to be used for the same purpose.

8 THE COURT: Well, with that, Mr. Torres, may
9 proceed.

10 **VOIR DIRE EXAMINATION**

11 **BY MR. TORRES:**

12 **Q.** Did you draft this document, sir?

13 **A.** I drafted the one for Buchanan.

14 **Q.** That's not my question. Did you draft this document,
15 sir?

16 **A.** No. No, sir.

17 **Q.** When was it drafted?

18 **A.** I do not know.

19 **Q.** Who drafted it?

20 **A.** I cannot tell you who drafted it.

21 **Q.** And do you know where this was maintained?

22 **A.** This is my copy that I had in my home that was given to
23 me.

24 **Q.** Who gave it to you?

25 **A.** I'm assuming Bill Phillips, the manager of employee

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1 relations, but I don't remember.

2 Q. You said you don't have a Buchanan document, correct?

3 A. I don't think I do, no. If I had, I would have given
4 it to Sam, I'm sure.

5 Q. So we have no way of knowing whether this is, in fact,
6 identical, correct?

7 A. I can't -- all I can tell you is what I know.

8 Q. Which is, you don't know whether they are identical,
9 because we don't have the Buchanan document, correct?

10 A. I know they were designed to be identical.

11 Q. That's not my question, sir. Whether they were
12 designed to be identical, whether you wanted this to convey
13 a uniform message, you don't know whether, in fact, this
14 document is identical to any document that you used at
15 Buchanan, correct?

16 A. I can't say that I do.

17 Q. So you agree with me, correct?

18 A. No, I don't agree with you. I'm not trying to be
19 argumentative. The point of this is -- and I understand
20 what you say, it's not identical -- but I can't tell you
21 exactly what's not identical. But I can tell you that the
22 organizing part is identical.

23 Q. Okay.

24 A. Because the organizing part is identical across the
25 company.

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1 Q. And you would know about the organizing portion of this
2 from 1983, or whenever you started working at the Buchanan
3 Mine, until you left in '93, right?

4 A. Yes, sir.

5 Q. All right. So you didn't draft this?

6 A. No.

7 Q. You don't know whether it's identical to what you used
8 at Buchanan?

9 A. No.

10 Q. And the only reason you have it is because Mr. Phillips
11 gave it to you?

12 A. That's right.

13 Q. Do you know who this was presented to that's a witness
14 in this lawsuit?

15 A. I don't know who -- I don't know who is a witness in
16 this lawsuit.

17 Q. Who is a plaintiff in this lawsuit? I apologize.

18 A. I don't really know who the plaintiffs are in this
19 lawsuit.

20 Q. So you don't know if any of the plaintiffs in this
21 lawsuit ever were read this or presented this, correct?

22 A. If they worked at Enlow, they saw this -- they heard
23 this script.

24 Q. Mr. Hymes, you don't know, in fact, whether any
25 plaintiff in this lawsuit was ever presented this material,

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1 correct?

2 **A.** I don't know who was presented the material. I know
3 that the strategy at CONSOL was to present this orientation
4 at the union-free location. So if you worked there, you
5 heard it.

6 **Q.** Do you know what the date of this document is?

7 **A.** No, I do not.

8 **Q.** Okay. And so if someone was working at Enlow Fork at
9 some period other than when this document was used, they
10 wouldn't have seen any of this, correct?

11 **A.** I don't -- I don't know what they would have seen or
12 not seen. They wouldn't have seen the script anyway; they
13 would only heard it.

14 **Q.** You don't know whether they heard it, because you don't
15 know when this was created, and you don't know when these
16 individuals attended the orientation, correct?

17 **A.** That's right.

18 MR. TORRES: Your Honor, there is no foundation
19 for the introduction of this document. And so, again, it
20 doesn't relate to Buchanan. You can't testify that this is
21 the same as Buchanan. He wasn't involved in developing it.
22 And he hasn't -- there is no evidence that any of the
23 plaintiffs ever heard what was contained in this script.
24 There was absolutely no testimony from any of the Buchanan
25 witnesses about this document.

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1 So I don't think there is a basis for introducing it;
2 certainly not through this gentleman.

3 THE COURT: Thank you.

4 MR. PETSONK: Your Honor, please instruct me as to
5 whether I should respond to Mr. Torres.

6 THE COURT: Sure.

7 MR. PETSONK: Well, Your Honor, Mr. Hymes has
8 testified he was involved in the consultation and the
9 development process for the union-free strategy at the
10 Bailey and Enlow Mines, even though he might not have
11 personally drafted out this particular script, as a product
12 of that consultation process. And he did testify he was a
13 part of it. And he testified he instructed and managed that
14 development process, and he was a part of it, and he
15 received the same instruction as the other people who were
16 involved in developing the Bailey and Enlow script.

17 And Mr. Hymes testified he received this script, to the
18 best of his recollection, from his counterpart, Mr.
19 Phillips, who had a similar role to him in the development,
20 although perhaps Mr. Phillips may have been the one who took
21 pen to paper to fill in the blanks that Mr. Hymes has
22 referenced regarding names.

23 And so I believe that Mr. Hymes not only had custody of
24 and knowledge of this script, and has testified that he used
25 it during the course of his management of union-free

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1 strategy during the period of 1986 to '93, when he carried
2 out that strategy at the Buchanan Mine; he had custody of
3 this document. He referred to it. He used it. And he was,
4 in fact -- he testified he was involved in the development
5 of this document, even though he may not have been the
6 scribe.

7 So for those reasons, I urge that there is sufficient
8 foundation to admit the document and allow me to inquire
9 further of Mr. Hymes about it.

10 MR. TORRES: Your Honor, could I just make one
11 more point? I'm sorry.

12 THE COURT: Yes.

13 MR. TORRES: Again, even if this gentleman had
14 some knowledge of this document secondhand, the issue here
15 for at least this document is whether anyone at Enlow Fork,
16 which would be, I guess Mr. Jack -- excuse me, Your Honor --
17 was promised lifetime benefits. Mr. Jack's testimony was
18 that the only promise of lifetime benefits that he heard
19 during his orientation at Enlow Fork was from the gentleman
20 who was speaking, who orally stated the benefits would be
21 for life. And he admitted on cross-examination that he
22 wasn't -- he didn't -- wasn't aware of any written promises
23 that were presented to him during orientation.

24 So again, even if this gentleman has some passing
25 knowledge of this document, because it's argued, allegedly,

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1 similar. Coming back to this lawsuit, what does the fact
2 that he knows about this orientation prove anything
3 regarding Mr. Jack's claim, because he admits he has no idea
4 who actually was presented this information. And Mr. Jack
5 testified that he wasn't aware of any written promises of
6 lifetime benefits; he just was promised it orally by the
7 gentleman who conducted the orientation.

8 So I'm not sure how that's even relevant. The fact
9 that -- the fact that CONSOL allegedly wanted to remain
10 union free is a perfectly lawful, appropriate thing for a
11 company to want to do. Other companies wanted to unionize;
12 others don't. That's their prerogative.

13 The issue in this lawsuit is not whether CONSOL had the
14 right to remain union free. The issue is whether these
15 gentleman that were identified by seven plaintiffs were
16 promised lifetime benefits and whether, in doing so, they
17 can be considered fiduciaries under ERISA.

18 I'm not sure what any of that has to do with the fact
19 that CONSOL preferred not to have union at his mine
20 operations. And the way that these gentlemen and woman are
21 going to prove their claim is by establishing that these
22 individuals, A., in fact, made a promise of lifetime
23 benefits; and B., as a matter of law under ERISA could be
24 considered fiduciaries.

25 So again, Your Honor, I don't see how any of this

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1 speaks to that issue. And certainly this gentleman is not
2 competent to testify to this, because he's admitted he
3 doesn't know who drafted it, who it was presented to. So it
4 doesn't relate to the issues in this lawsuit.

5 THE COURT: Thank you.

6 One final word, Mr. Petsonk?

7 MR. PETSONK: Yes, Your Honor. Mr. Hymes is being
8 offered as a corroborating witness, to corroborate the
9 veracity or the lack thereof of the testimony tendered by
10 other witnesses in the case.

11 Mr. Torres is objecting to the admission of this
12 exhibit for the purpose of corroborating -- or for the
13 purpose of reference of this witness and his corroborating
14 testimony. Mr. Torres has not established that this witness
15 fails to adequately authenticate that exhibit.

16 I don't understand there is any defect with Mr. Hymes'
17 ability to authenticate what this is. He's been a custodian
18 of it. He has possessed it. He provided it. He has
19 knowledge of its origin and contents. And he knows how he
20 used it in his job for CONSOL. And so it -- and it's
21 certainly relevant, because of the -- because of the need to
22 corroborate the testimony of the other witnesses in this
23 case. This is a document that was utilized in the -- in the
24 presentation of the orientation sessions that people have
25 testified about in this case. And the document tends to

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1 support the truth of what these other individuals have said.
2 It serves as a useful piece of corroborating evidence; it's
3 relevant, and it's certainly part of the authentication by
4 Mr. Hymes. So I would urge it be admitted.

5 THE COURT: Thank you.

6 Let me ask you, Mr. Hymes, are you able to go through
7 this document and discern what the differences are? I
8 recognize, of course, it's been 27 years since you were with
9 the company. Before undertaking to answer that question,
10 let me ask you another one.

11 When did you get this from Mr. Phillips?

12 THE WITNESS: Probably right before I left CONSOL.

13 THE COURT: So you've had it in your file ever
14 since?

15 THE WITNESS: Yes, sir.

16 THE COURT: And back to my initial question.
17 After this length of time, are you able to go through this
18 and discern what the differences are between this and what
19 was at Buchanan?

20 THE WITNESS: Yes, sir, I'm pretty sure I could.
21 Nobody's ever asked me to do that.

22 THE COURT: I take it that probably Mr. Hymes was
23 brought on today so he could be free after today. Is that
24 the case?

25 MR. PETSONK: That was certainly the hope, Your

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1 Honor, but -- yes.

2 THE COURT: And so I simply wonder whether or not
3 we could recess at this point and have Mr. Hymes go through
4 the document to see whether or not he can speak --
5 ultimately speak to what the differences are between this
6 and what he aided and designed at Buchanan.

7 And I would ask the parties whether or not you have
8 anything further with respect to that suggestion?

9 MR. PETSONK: Well, speaking for myself, Your
10 Honor, if I may? I don't object to that. I can proffer for
11 Your Honor that this document as lengthy, though it is, does
12 not even represent the entirety of the script that was
13 utilized in these orientations.

14 THE COURT: I hope that, however, you'll be
15 content with this.

16 MR. PETSONK: This is all we have. So, yes, this
17 is a part that Mr. Hymes was able to find that he still had.
18 And, Your Honor, I don't intend to go page-by-page through
19 this document. I simply want to use it to bolster and
20 corroborate the testimony about the actions of the alleged
21 fiduciary agents in this case. And so I do not intend to go
22 through it exhaustively, but waiting for the witness to
23 examine it more closely is helpful, I certainly don't oppose
24 that.

25 THE COURT: Mr. Torres.

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1 MR. TORRES: Your Honor, I mean, before we put
2 this gentleman to the task of reviewing this document to
3 identify differences, I ask Mr. Petsonk to identify a single
4 word in there that corroborates the testimony of his
5 clients. There is no promises of lifetime benefits in that
6 document, Your Honor. That is the issue.

7 If there is -- there is not even a comparison, if I
8 recall correctly, between the UMWA benefits and, Your Honor,
9 the retiree medical plan. But even if they do, there is no
10 promise that the benefits will never change.

11 So that's the issue. Unless Mr. Petsonk can say,
12 here's the lifetime promise, it doesn't corroborate
13 anything. And again, it only relates to Enlow Fork. So the
14 only thing this document can do is allegedly corroborate Mr.
15 Jack's testimony. And, as I said before, Your Honor, Mr.
16 Jack said the only promises he received were oral. So that
17 document wouldn't do anything to proffer it.

18 THE COURT: Let me ask, Mr. Petsonk, is there
19 nothing in this document with respect to the benefits being
20 lifetime?

21 MR. PETSONK: Your Honor, I can -- I would like to
22 proffer some examples of what is relevant and what I seek to
23 elicit from Mr. Hymes as to this document.

24 First, on the page stamped 344, the document reads,
25 "Part of this is lawyer talk." We've referenced the -- the

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1 use of the phrase "Lawyer Talk."

2 And it says, "And there is another point, just as
3 important as I talked about. And this is primarily what the
4 lawyer talk is about. This handbook doesn't create an
5 employment contract between the company and its people. If
6 you are terminated and want to sue us in court and say that
7 we violated your employment contract, then you are going to
8 see us waving this handbook at the Judge and pointing to
9 page -- blank. Now, I guess that sounds pretty blunt,
10 but -- and it goes on -- pretty blunt. I probably could
11 have thought about it for a few minutes and found a nicer
12 way to say it. But, that's what it means."

13 And it goes on to say, the other thing I want to do
14 before we start looking in detail at your pay and benefits
15 is turn over the floor to -- blank, and the name is
16 missing -- for a few minutes. He has a few things he wants
17 to share with us.

18 That's the portion before the benefits are presented
19 when the unnamed presenter named fill-in-the-blank goes on
20 to make some explanation.

21 I would like to elicit testimony about that from Mr.
22 Hymes and there are one or two other points, Your Honor, but
23 I don't want to belabor this. It's a several-hundred page
24 document. But another instance on page stamped 401, it
25 says, it compares the CONSOL retiree wage and benefit

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1 package to the 1988 Bituminous Coal Wage Agreement, which is
2 the national union contract that CONSOL was a party to at
3 all relevant times here, and it says, as you can see, the --
4 it says, so why do I say that wages and benefits is one
5 reason why you are better off at Enlow Fork without a union?
6 And it goes on to explain about the benefits package, and it
7 says, you know that this wage and benefit package is clearly
8 superior to any wage and benefit package negotiated by the
9 UMWA for anybody anywhere.

10 Next, you do not have to go through a prolonged,
11 possibly bitter negotiations to receive these benefits, and
12 so forth.

13 So, you know, there are a couple of explicit
14 comparisons, including with charts and relevant slides that
15 are contained here. And that's what I would question Mr.
16 Hymes about, how these comparisons were presented to new
17 employees during the orientation. And that's all been the
18 subject of the testimony.

19 THE COURT: Getting back to Mr. Torres' comments a
20 moment ago. He says there is nothing in there about a
21 lifetime benefit. And I take it that must be true, because
22 I haven't heard you point it out.

23 MR. PETSONK: The phrase "Lifetime Benefits" is
24 not used in this script. But the comparison --

25 THE COURT: Anything comparable to it?

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1 MR. PETSONK: Well, Yes, Your Honor, there is.
2 The presentation of the particular terms of the UMWA plan
3 and the representation here that the CONSOL plan is superior
4 to the UMWA benefits.

5 THE COURT: Beyond that, I understand that this is
6 not all that was presented. This is just simply part. Was
7 there a script more than this?

8 MR. PETSONK: This is the script for day one of
9 the orientation. And I can set that forth. And then what
10 you heard, Your Honor, is that on day three of the
11 orientation, the miners were asked to bring their wives in.
12 This is not the script for that day. That was the
13 summation. That was the end of the dog and pony show, as it
14 were, and the wives -- and that's what I would like to
15 elicit testimony about, as well.

16 THE COURT: This is day one and there are
17 five-and-a-half days or just three days, whatever the length
18 may have been. What about the other days?

19 MR. PETSONK: I can ask Mr. Hymes to testify. I
20 don't have the other days. I think Mr. Hymes doesn't have
21 the other days. This was all 30 years ago, so not all the
22 documents survived. And certainly we sought them in
23 discovery and we didn't get them from CONSOL. So I gather
24 CONSOL doesn't have them either.

25 THE COURT: Mr. Torres.

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1 MR. TORRES: Your Honor, first off, just to
2 correct one misstatement by counsel that MSJ 324 says, "I
3 would like to welcome all of you as employees and your
4 spouses to the Enlow Fork." So I guess this is the day that
5 he claims this was all discussed.

6 But, in any event, Your Honor, comparing benefits
7 between CONSOL and the UMWA -- obviously, Mr. Petsonk is
8 unwilling to concede that it doesn't make any promise of
9 lifetime benefits.

10 And the other thing, Your Honor, and you recognize this
11 under Summary Judgment in the class certification ruling,
12 this gentleman has no evidence of what actually was said in
13 any of these presentations. All he can say is that he was
14 involved in developing some of them, but he wasn't the
15 individual who actually presented them.

16 So if this issue in the lawsuit is what was said to the
17 plaintiffs, -- this could say all sorts of things, but
18 unless he can say, I know that they were told X and Y, he
19 has no personal knowledge of anything that's relevant to
20 corroborating the testimony of these witnesses.

21 And Mr. Petsonk keeps generically saying he can
22 corroborate their testimony.

23 He wasn't there after 1993. So the only person he
24 could have -- that was around was Mr. Casey. He clearly
25 wasn't there when Mr. Jack attended his orientation.

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1 So how is any of that even corroborating? Even if he
2 can say, yeah, this is similar to the script used at
3 Buchanan.

4 What is relevant is not what the written document is,
5 but what the individuals were actually shown and told. And
6 he has absolutely no personal knowledge of what happened in
7 the exchanges between these plaintiffs and the individuals
8 that they specifically identified. They had all the
9 opportunity to say all the things that they were shown and
10 what they were told. You've heard all that testimony. And
11 none of it involved Mr. Hymes. And he has no personal
12 knowledge of any of that.

13 THE COURT: Anything further?

14 MR. PETSONK: Well, Your Honor, in addition to
15 corroborating the veracity of what the plaintiffs say that
16 they heard, this exhibit in this line of testimony also
17 corroborates another significant, legally significant fact,
18 which is the reasonableness or the -- of the plaintiffs'
19 understanding about the apparent authority carried by the
20 individuals who made these misrepresentations that we've
21 alleged about the benefits.

22 And so Mr. Hymes is corroborating not only the fact of
23 who said what to whom, but what was the -- the role of the
24 people who made these representations, and was it
25 reasonable. What may the Court conclude that those HR

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1 managers were, in fact, apparent agents, it was reasonable
2 for the miners to understand they were the apparent agents
3 of the fiduciary, the named fiduciary, and the other legal
4 fiduciaries that we've alleged here in this plan.

5 So we seek to corroborate as to that fact, as well. I
6 took your direction from Your Honor, that is a significant
7 fact that proves our theory that they are apparent agents of
8 the fiduciary. And so it corroborates for that important
9 purpose as well.

10 MR. TORRES: How can he testify as to their
11 apparent authority when he wasn't present when they made the
12 presentations? Your Honor, whether someone -- the test for
13 fiduciary under ERISA, when you are looking at whether it is
14 a functional fiduciary, is whether the individual in their
15 actions assumed the fiduciary responsibility. And that
16 requires in all the cases that evaluate this, looking at
17 what the individual said, is there evidence that the
18 corporation provided them -- as in the *Pirelli* case --
19 inaccurate information that they admittedly disseminated to
20 the plaintiffs in that case.

21 That's how you determine whether someone is considered
22 a functional fiduciary.

23 Alternatively, on this theory that there is some status
24 of, you know, someone with apparent authority. How does he
25 testify to that when he wasn't present when any of these

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1 presentations were made? And there is nothing in this
2 document -- which, again, he didn't draft and doesn't know
3 who prepared -- that says, "Hey, I have apparent authority
4 to make you lifetime promises."

5 So again, how does Mr. Hymes corroborate the apparent
6 authority of people who he wasn't present for when they
7 actually made the presentation? Unless he's going to say,
8 Mr. Fox came to me and said, "Hey, I promised these people
9 lifetime benefits. And I told him he had the authority to
10 do that."

11 But he's not going to do that, Your Honor.

12 THE COURT: I think insofar as the authority is
13 concerned, the latter will show who is the fiduciary at the
14 time. And whether it extends to agents even several rungs
15 down the line will suffice, for if the fiduciary it seems to
16 have authorized these statements, then the fiduciary is
17 simply bound by them.

18 The exhibit itself -- I'm disturbed, because I hear
19 that not only it's not identical, but there are other parts
20 of it. And whether those other parts have any bearing on
21 this, perhaps Mr. Hymes could tell us. But I go back to
22 what I suggested.

23 If the effort is to be made to go through this and find
24 out whether or not it is indeed essentially the same, by
25 scanning through it for the differences, then the Court can

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1 evaluate those differences once it hears them and decide
2 whether or not this can come in. If you want to try it
3 overnight, you're welcome to do it.

4 If not, we need to -- you need to conclude with this
5 witness on whatever grounds you have in the morning.

6 It's now 5:30. And we need to recess for the evening.
7 I'm sorry to inconvenience you, Mr. Hymes, but we are going
8 to have to have you back in the morning and after having
9 spent I hope some time to look through this, to see whether
10 or not you can be more specific about the differences.

11 MR. PETSONK: Your Honor, if I may? There are a
12 couple other exhibits that we wish to present through Mr.
13 Hymes. And I can present them to the Court now if the Court
14 would like to give me instruction about them, or leave it
15 with the Court. I'll present them to Mr. Hymes to review
16 this evening so he can make a similar representation based
17 on some benefit of time to review before court tomorrow.

18 THE COURT: And so what do you suggest now?

19 MR. PETSONK: That I will give Mr. Hymes the
20 remainder of the exhibits I seek to admit through him so he
21 can review them. They are somewhat lengthy, and he can
22 review them this evening and resume his testimony tomorrow
23 with the benefit of that review.

24 THE COURT: Well, there is no basis to objecting
25 to that, is there?

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1 MR. TORRES: No, Your Honor. I want to make sure
2 Mr. Hymes is required to do that without consulting with
3 counsel.

4 THE COURT: It's going to be at his scrutiny
5 unaided by counsel, but you might identify those additional
6 exhibits to which you're referring.

7 MR. POMPONIO: Your Honor, may I make a suggestion
8 or comment? Could we identify the portions of these
9 documents that we seek to elicit testimony about and then
10 have the witness determine if there is anything different
11 from the Buchanan script that he created, rather than going
12 through the entirety of these documents?

13 And if the defendants would like to point to some
14 difference in the documents that we are not designating,
15 then they certainly have the opportunity to do that on
16 cross-examination.

17 THE COURT: Mr. Torres, do you wish to respond?

18 MR. TORRES: Yes, Your Honor. I mean, again, I
19 guess the problem is that if these -- it seems to me we'll
20 end up with sort of the same exercise if he's not asked to
21 review the entire document. Because if we then get into
22 other pages that he's saying are different -- just seems to
23 me if he's reviewing it to identify the differences, it's
24 hard for me to guess right now whether I point to some page
25 and we are going to end up in the same exercise we are

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1 asking him to review it and tell us the differences. It
2 seems to be a laborious process for cross-examination.

3 THE COURT: Thank you.

4 The Court appreciates that suggestion, and I would like
5 the witness to be particularly attentive to that, those
6 sections, but I think the witness needs to go through the
7 entirety of the document. And so that the witness will
8 expect that the Court will expect that to be done.

9 Anything further? And do you want to identify those
10 additional exhibits?

11 MR. TORRES: Could I ask one other clarification,
12 Your Honor? In addition to that, speaking with counsel, I
13 assume that in the middle of the examination, he's not to
14 speak with anyone else about his testimony as well.

15 THE COURT: The witness is directed not to discuss
16 this case or his testimony with anyone. He's to treat
17 himself as though he's on the witness stand overnight.

18 And I think you already understand that part.

19 THE WITNESS: Yes, sir.

20 THE COURT: But there is no reason you can't hand
21 him those exhibits now. And I don't how you are going to
22 get through all this and get any sleep. But you may have to
23 adjust the time when he returns tomorrow.

24 MR. PETSONK: Well, I would suggest that he should
25 return at 9:30, if that's when we resume Court at that time.

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1 And so long as Mr. Hymes is comfortable that he can conduct
2 a sufficient review in the evening and not need time during
3 the morning for further review.

4 THE COURT: Well, if he can't do that, he'll just
5 have to come in later. And it's understandable that he
6 would. So invite him back at 9:30, but we might not seat
7 him that soon. So you need to be ready to go with another
8 witness. And I understand you have Mr. Fitzwater, at least,
9 yet to testify.

10 Again, what other documents aside this one is he to
11 consider?

12 MR. PETSONK: There is a similar script, a portion
13 of a similar -- a portion of a similar script, the day one
14 presentation from the Bailey Mine that Mr. Hymes still has
15 in his possession. And that is Bates MSJ 463 through 581.

16 THE COURT: Does it have a title?

17 MR. PETSONK: It's simply called, "Bailey
18 Introductions, Supervisor IE&R," like the Enlow exhibit.
19 And there are -- there are three slideshows from Buchanan.
20 And those are Bate-stamped by the defendant. And --

21 THE COURT: And so are the three slides in textual
22 form?

23 MR. PETSONK: Yes. Well, they are PowerPoint
24 presentations, printed off on 8 1/2 x 11 pages.

25 THE COURT: So we have a copy of what was perhaps

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1 put on a screen?

2 MR. PETSONK: Yes. It purports to be that way,
3 yes.

4 MR. TORRES: Your Honor?

5 THE COURT: And so let's identify what this is.
6 You said there were three.

7 MR. TORRES: Your Honor, could I speak?

8 THE COURT: Do you have a title?

9 MR. PETSONK: These were, yes, there is a title.
10 These are all exhibits to the defendant's deposition of the
11 witness here. And the first exhibit is entitled: "Welcome
12 to Buchanan Orientation Program, Five Days." And it's
13 Bate-stamped CONSOL 25869 through CONSOL 25887.

14 MR. TORRES: 869, you said?

15 MR. PETSONK: 25869 is the first page, and the
16 last page is CONSOL 25887.

17 MR. TORRES: Okay.

18 MR. PETSONK: And the next exhibit, the title on
19 the first page called "Organizing Tactics," and it's stamped
20 CONSOL 25888 through 25905.

21 Your Honor, I have one other item here, our
22 Bate-stamped MSJ 582 through 659.

23 MR. TORRES: I'm sorry, 582, you said?

24 MR. PETSONK: MSJ 582 through 659. I may not need
25 to go through all of these, Your Honor, but I wanted to

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1 present that, as well as the Bates range that I can present
2 to Mr. Hymes for review.

3 THE COURT: So those exhibits, one's about 20
4 pages, one's about 18 pages, and one is about 80 pages?

5 MR. PETSONK: Yes, Your Honor, roughly.

6 THE COURT: And you've given us the markings on
7 them, and that, together with plaintiff's 10, would be what
8 you would present -- just a moment -- for Mr. Hymes to
9 review. Does that cover it?

10 MR. PETSONK: The other Bates range is 25522, and
11 this is a CONSOL Bates stamp.

12 MR. TORRES: Hold on a second. You said 25 --

13 MR. PETSONK: 25522.

14 MR. TORRES: 25522?

15 MR. PETSONK: Right, CONSOL 25522 through CONSOL
16 25579.

17 MR. TORRES: 79, you said?

18 MR. PETSONK: Yes.

19 MR. TORRES: Your Honor, just to try and make --
20 Mr. Petsonk was saying that some of these documents were the
21 subject of a deposition in this case. Just to show how far
22 afield we are getting. The documents from CONSOL that he's
23 identified are from 2010 and 2011. So those would have been
24 some number of years after this gentleman worked at CONSOL.

25 And so even putting aside this other exercise about the

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1 documents from the '80s, again, how is this gentleman going
2 to testify competently as to documents that existed more
3 than 10 years after he worked at the company?

4 THE COURT: Well, when you said 2010, '11, in that
5 area, to what are you referring on these documents that Mr.
6 Petsonk has just noted? He's given us four items. Are they
7 all in that time range?

8 MR. TORRES: All the documents -- the two
9 documents he identified with the CONSOL Bates ranges are
10 from 2010 and 2011. The documents with the MSJ designations
11 from the plaintiffs, one of them, apparently, is from 1988.
12 So that's when the gentleman was around and it does relate
13 to Buchanan.

14 And we've got this other document that we've been
15 dealing with, which, you know, the gentleman doesn't know
16 exactly what time period it was used, but, you know --

17 THE COURT: Well, my thought simply is that if in
18 light of that, Mr. Petsonk, still wants Mr. Hymes to review
19 those items, you're welcome to do so, but it does look to me
20 as though it may be questionable as to if they are coming
21 in. They just may not be in a time when he can vouch for
22 them.

23 MR. PETSONK: I understand, Your Honor. I will
24 certainly encourage him to spend the time with the documents
25 that he gave to me which are the ones from his time period

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1 of employment with CONSOL.

2 THE COURT: And that's Plaintiff's 10 and, more
3 particularly, one of those four or five -- I can't remember
4 how many.

5 MR. PETSONK: There were two more exhibits after
6 Plaintiff's 10 that came from his time period, and those are
7 the ones I will ask him to scrutinize.

8 THE COURT: Let me ask if the parties have
9 anything further at this time?

10 MR. PETSONK: Not from the plaintiffs, Your Honor.

11 MR. TORRES: No, Your Honor. Thank you.

12 THE COURT: Mr. Hymes, excuse me. Since you are
13 the victim here.

14 THE WITNESS: I was going to say, I would like to
15 be on early in the morning. I'll spend the time tonight.
16 Because I have another obligation tomorrow evening. So I
17 would like very much to -- I booked a hotel room for two
18 nights. I thought this might happen.

19 THE COURT: Well, you've probably had experience
20 along these lines.

21 What time do you think you can return?

22 THE WITNESS: What time is the start?

23 THE COURT: Well, we start at 9:30.

24 THE WITNESS: I can be here at 9:30.

25 THE COURT: Well, if you are sure you can go

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1 through this and get through all this and do that, too?

2 THE WITNESS: Yes, sir.

3 THE COURT: But if you need more time -- of
4 course, you need to get through it, and if you need more
5 time, then take it. And just let counsel know that you are
6 not going to be here at 9:30 and they'll have to have
7 somebody else.

8 THE WITNESS: Okay, sir.

9 THE COURT: Thank you.

10 MR. PETSONK: Thank you, Your Honor.

11 THE COURT: Let me ask if the parties have
12 anything further at this time?

13 MR. PETSONK: Not from the plaintiffs.

14 MR. TORRES: Nothing from the defendants, Your
15 Honor.

16 THE COURT: If not, we'll resume at 9:30 in the
17 morning. Thank you.

18 THE CLERK: All rise.

19 (Proceedings concluded at 5:45 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine Schutte-Stant, Federal Official Realtime
3 Court Reporter, in and for the United States District Court
4 for the Southern District of West Virginia, do hereby
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13 _____ February 26, 2021

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